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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 211

SHANFEBOKE COAL & SUPPLY CORPORATION OF DELAWARE, PETITIONER,

vs.

WESTCHESTER SERVICE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 31, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 211

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE, PETITIONER,

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UNITED STATES CIRCUIT COURT
OF APPEALS,

1

FOR THE SECOND CIRCUIT.

SHANFEROKE COAL & SUPPLY CORPORATION
OF DELAWARE,

Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant. 2

Statement Under the Rule.

The above entitled action was commenced on February 28th, 1933.

The names of the original parties are above set forth, and there has been no change of parties since the commencement of the action.

The complaint in this action was served on February 28th, 1933, and defendant's answer was served on July 27th, 1933. 3

The motion to dismiss plaintiff's first cause of action was heard on October 6, 1933, by Judge John W. Woolsey.

The order appealed from, denying defendant's motion for a stay, was entered on the 14th day of December, 1933.

The appeal herein was taken January 12, 1934.

The plaintiff appears by Moos, Nathan, Imbrey & Levine. The defendant appears by Ehrich, Royall, Wheeler & Walter.

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L. 54—Page 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE

—against—

WESTCHESTER SERVICE CORPORATION.

To the above-named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 23rd day of February, A. D. 1933.

CHARLES WEISER,
Clerk.

MOOS, NATHAN, IMBREY & LEVINE,
Plaintiff's Attorneys,
Office & Post Office Address,
500 Fifth Avenue,
Borough of Manhattan,
City of New York.

(Seal of Court.)

Complaint.

7

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

8

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above named plaintiff, Shanferoke Coal & Supply Corporation of Delaware, appearing by Moos, Nathan, Imbrey & Levine, its attorneys, for its complaint herein alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

9 First: That at all times hereinafter mentioned, plaintiff was and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and a citizen of said State.

Second: Upon information and belief that at all times hereinafter mentioned, the above named defendant was and still is a corporation, organized

10 and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office and place of business in the City of Yonkers, County of Westchester, State of New York and Southern District of New York.

Third: That the grounds upon which the jurisdiction of this Court depends are the diversity of citizenship of the parties, and the fact that the amount in dispute, exclusive of interests and costs, far exceeds the sum or value of $3,000.00.

Fourth: That heretofore and prior to January
11 25th, 1930, the plaintiff duly entered into a written agreement with The Hudson Coal Company, wherein and whereby plaintiff was granted the sole and exclusive sale agency, for the sale of anthracite coal produced by said Hudson Coal Company, in certain territories, including territories in which defendant's principal business was carried; that by virtue of and under and by the terms and conditions of said agreement, plaintiff was entitled to receive a commission on all anthracite coal, produced by said Hudson Coal Company, and sold in the said territories; that the said agreement was
12 in full force and effect at all times hereinafter mentioned.

Fifth: That on or about January 25th, 1930, defendant duly entered into a written agreement with The Hudson Coal Company, wherein and whereby the latter duly agreed to sell and deliver to the defendant, through either the plaintiff, or the North River Coal Company, or through whoever might be the wholesaler or wholesalers of The

Hudson Coal Company's anthracite in the territories in which the defendant's business was carried on, and the defendant duly agreed to purchase from The Hudson Coal Company, through such wholesaler or wholesalers, during a period of not less than three years or more than five years, beginning on February 1st, 1930, 80,000 gross tons (of 2240 lbs. to the ton) of anthracite coal, of domestic sizes, by which was meant pea, grate, egg, stove and chestnut; that it was further provided in and by said agreement that defendant would order and accept delivery of such coal, during said period, in as nearly equal monthly installments as practicable, it being duly agreed between The Hudson Coal Company and the defendant, that delivery of such coal by The Hudson Coal Company or its designated wholesaler, and its acceptance by defendant should extend over a period of not less than three years or more than five years in as even a manner as practicable.

Sixth: That under and by the terms of said agreement last mentioned defendant was obligated, at all times hereinafter mentioned, to order and accept from The Hudson Coal Company, through such of its aforementioned wholesalers as it might designate, on the average at least 1333 gross tons of coal per month.

Seventh: That at all times herein mentioned, plaintiff was the wholesaler and sole distributing agent of the Hudson Company's anthracite coal in the territories in which defendant's principal business was carried on, and was designated as the wholesaler to receive the benefit of the said agree-

16 ment between plaintiff and The Hudson Coal Company, and was accepted as such by the defendant, and plaintiff thereupon duly received orders directly from the defendant, from time to time, for the sale and delivery of anthracite coal, under the said agreement between The Hudson Coal Company and the defendant.

Eighth: That plaintiff and The Hudson Coal Company, duly performed all the terms and conditions of the said agreement, referred to in paragraph "Fifth" of this complaint, on their part to be performed, except the furnishing, sale and deliv-
17 ery of the coal hereinafter mentioned, and duly furnished coal to the defendant under said agreement, in accordance and compliance with defendant's orders.

Ninth: That defendant since December 1st, 1931, without just cause, has neglected and refused to order, accept or pay for at least an average of 1333 gross tons of coal per month, as required by its said agreement, but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has
18 failed to order or accept any coal whatsoever from plaintiff or The Hudson Coal Company; that defendant is now in default under its said agreement to the extent of approximately 20,049 gross tons of coal; that heretofore and prior to the commencement of this action defendant notified plaintiff and The Hudson Coal Company that it would not order, accept or pay for coal as provided for in its said agreement and repudiated the same.

Tenth: That plaintiff and The Hudson Coal Company were at all times ready, able and willing to perform the said agreement, referred to in paragraph "Fifth" of this complaint, with respect to furnishing, selling and delivering coal, in accordance with the terms and conditions of the said agreement, and would have furnished, sold and delivered the same according to the terms and conditions of said agreement, but for defendant's aforesaid neglect, refusal and repudiation. 19

Eleventh: That there remains to be delivered to defendant under its said agreement, in all, a balance of approximately 57,398 gross tons of coal. 20

Twelfth: That plaintiff, as defendant well knew, was entitled to and received commissions, by virtue of its aforesaid agreement with The Hudson Coal Company, upon all coal sold and delivered by or through it to defendant, under the aforementioned agreement between The Hudson Coal Company and the defendant; that by reason of defendant's neglect, refusal and repudiation, as aforesaid, plaintiff lost and has been deprived of all commissions which it would have earned on the sale and delivery of the said balance of approximately 57,398 gross tons of coal, to its damage in the sum of $11,479.66. 21

AS AND FOR A SECOND CAUSE OF ACTION:

Thirteenth: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs marked "First", "Second", "Third", "Fourth", and "Seventh" herein, with the same force and effect as though herein fully set forth at length.

22 Fourteenth: That on or about January 22nd, 1931, plaintiff and defendant duly entered into a written agreement wherein and whereby plaintiff duly agreed to sell and deliver to defendant, and the latter duly agreed to purchase from plaintiff, during a period of not less than three years or more than five years from said date, 75,000 gross tons (of 2240 lbs. to the ton) of anthracite coal in the sizes of grate, egg, stove, chestnut, pea and buckwheat, in the proportions in which said sizes would be produced by The Hudson Coal Company; that it was further provided in and by said agreement
23 that defendant would order and accept delivery of said coal, during said period, in as nearly equal monthly installments as practicable, it being duly agreed between plaintiff and defendant that delivery of the said coal by plaintiff and its acceptance by defendant should extend over said period of not less than three years or more than five years in as even a manner as practicable.

Fifteenth: That under and by the terms of said agreement, defendant was obligated, at all times hereinafter mentioned, to order and accept from plaintiff, on the average, at least 1250 gross tons
24 of coal per month.

Sixteenth: That defendant since December 1st, 1931, without just cause, has neglected and refused to order, accept or pay for at least an average of 1250 gross tons of coal per month, as required by said agreement but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has failed to order or accept any coal whatsoever from plain-

tiff; that defendant is now in default under the said agreement, to the extent of approximately 16,173 gross tons of coal; that heretofore and prior to the commencement of this action, defendant notified plaintiff it would not order, accept or pay for coal as provided in its said agreement, and defendant repudiated the same. 25

Seventeenth: That plaintiff was at all times herein mentioned, ready, able and willing to perform the said agreement on its part, with respect to furnishing, selling and delivering coal in accordance with the terms and conditions of the said agreement, and would have furnished, sold and delivered the same, according to the terms and conditions of said agreement, but for defendant's aforesaid neglect, refusal and repudiation. 26

Eighteenth: That there remains to be delivered to defendant, under said agreement, in all, a balance of 52,309 gross tons of coal.

Nineteenth: That plaintiff, as defendant well knew, was entitled to and received commissions, by virtue of its aforesaid agreement with The Hudson Coal Company, upon all coal sold and delivered by it to defendant, under the aforesaid agreement between plaintiff and defendant; that by reason of defendant's neglect, refusal and repudiation, as aforesaid, plaintiff lost and has been deprived of all commissions which it would have earned on the sale and delivery of the said balance of 52,309 gross tons of coal, to its damage in the sum of $9851.74. 27

WHEREFORE, plaintiff prays for judgment against the defendant on both causes of action for the

sum of $21,331.40, with interest thereon, and the costs and disbursements of this action.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

By A. T. GOODENOUGH,
President.
(Corporate Seal)

MOOS, NATHAN, IMBREY & LEVINE,
Attorneys for Plaintiff,
Office & P. O. Address,
500 Fifth Avenue,
Borough of Manhattan,
City of New York.

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The defendant, Westchester Service Corporation, appearing by Ehrich, Royall, Wheeler & Walter, its

attorneys, for its answer to the Second Cause of Action alleged in the complaint in this action, alleges: 31

1. The said defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "Fourth" and "Seventh" of said complaint, except so much of paragraph "Seventh" as alleges that the plaintiff received orders directly from the defendant for the sale and delivery of the anthracite coal by and from Hudson Coal Company.

2. Defendant denies each and every allegation contained in paragraphs numbered "Fifteenth", 32
"Sixteenth", "Seventeenth", and "Eighteenth" of said complaint.

3. The said defendant denies that it has any knowledge or information sufficient to form a belief as to whether plaintiff was entitled to receive commissions from Hudson Coal Company upon all coal sold and delivered by it to the defendant as alleged in the paragraph of the complaint numbered "Nineteenth" and denies each and every other allegation contained in said paragraph numbered "Nineteenth" of the complaint.
33

FOR A SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

4. That at all times since January 22, 1931, defendant has been and still is ready, able and willing to purchase from plaintiff within five years from said date, 75,000 gross tons of anthracite coal pursuant to the agreement alleged in the Second Cause of Action in the complaint herein.

34 5. That between January 22, 1931 and January 1, 1933, defendant purchased from plaintiff pursuant to said agreement in excess of 17,000 gross tons of anthracite coal in as nearly equal monthly amounts as practicable under the circumstances then existing in its business and in the coal trade generally and in the prudent management of its business and affairs.

6. That prior to the commencement of this action, and on or about January 3, 1933, defendant ordered from plaintiff seven cars of anthracite coal of approximately 390 gross tons, that plaintiff
35 refused to accept said order from the defendant and in the month of January, 1933, plaintiff notified defendant that it would refuse to accept orders from defendant and to sell defendant coal pursuant to said agreement and has ever since refused to accept such orders and to ship and deliver coal to defendant under said agreement, and that by reason of such refusals on the part of the plaintiff, the defendant has been and will be unable to perform the said agreement and performance thereof by the defendant has become impossible.

36 FOR A SECOND SEPARATE AND DISTINCT DEFENSE, THE DEFENDANT ALLEGES:

7. That the agreement alleged in the Second Cause of Action in the complaint contains the following provisions:

> "In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dis-

pute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

8. That prior to the commencement of this action, a dispute had arisen between plaintiff and defendant as to the performance and construction of said agreement alleged in the Second Cause of Action with respect to the following and other matters. That plaintiff charged defendant with being in default in the purchase of coal pursuant to said agreement, and defendant disputed and does still dispute said charge, that plaintiff refused to accept orders for coal pursuant to said agreement except under conditions laid down by it to which defendant refused to accede, that plaintiff charged that defendant had repudiated the said agreement and defendant denied said charge and asserted and does still allege that it is ready, able and willing to perform said agreement on its part and has been and still is prevented from so doing by plaintiff's refusal to accept orders from it under the said agreement and that plaintiff asserted that the alleged defaults of defendant in placing orders under said agree-

ment during the year 1932, justified plaintiff in its refusal to accept further orders from defendant during the remaining three years of the agreement and that defendant denied this and demanded and was refused the right to continue to perform said agreement subsequent to January 3, 1933.

9. That defendant has been at all times since said dispute arose and still is ready and willing to arbitrate the said dispute, and that prior to the commencement of this action, defendant notified the plaintiff of its readiness and willingness to arbitrate such a dispute and that plaintiff has refused and neglected to proceed to arbitration as provided in said contract, and that defendant is in no manner in default in proceeding with such arbitration.

WHEREFORE, defendant demands that the complaint herein be dismissed with costs.

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for the Defendant,
20 Exchange Place,
New York City, New York.

(Verified by Gerald S. Couzens as president of defendant on July 26, 1933.)

Notice of Motion.

43

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

File No. L54—P. 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant. 44

Sirs:

PLEASE TAKE NOTICE that upon the affidavit of Ernest E. Wheeler verified August 10, 1933, hereto annexed, and upon the notice of motion, dated March 25, 1933, and the affidavits of Gerald S. Couzens and Abraham H. Elkind, both verified March 24, 1933, and the papers referred to therein and made a part thereof, said notice of motion and affidavits having been filed upon an application heretofore made for the same relief now requested, 45 and upon the order of the Hon. William Bondy, dated July 18, 1933, denying said former application without prejudice to renewal thereof after defendant's answer had been served, and upon the pleadings and all proceedings heretofore had herein, the undersigned will move this Court at a Stated Term thereof for the hearing of motions to be held

in and for the Southern District of New York, at the Court House, in the United States Post Office Building, located at Broadway and Park Row (Room 235), Borough of Manhattan, City of New York, on the 15th day of August, 1933, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order as provided in 9 U. S. C. A., Sec. 3, staying the trial of this action and all proceedings herein until an arbitration has been had in accordance with the terms of the agreement entered into by and between the parties to this action and referred to in the second cause of action contained in the complaint, and for such other and further relief as to the Court may seem just.

Dated, New York, N. Y., August 10, 1933.

Yours, etc.,

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for Defendant,
Office & P. O. Address,
20 Exchange Place,
Borough of Manhattan,
City of New York.

To:

Moos, Nathan, Imbrey & Levine, Esqs.,
Attorneys for Plaintiff,
500 Fifth Avenue,
New York, N. Y.

Affidavit of Ernest E. Wheeler, Read in Support of Motion.

49

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L54—108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

50

State of New York,
County of New York—ss.:

ERNEST E. WHEELER, being duly sworn, deposes and says: that he is an attorney and counsellor-at-law duly admitted to practice in the Federal courts, and a member of the firm of Ehrich, Royall, Wheeler & Walter, attorneys for the defendant, and that he is familiar with all the proceedings heretofore had herein.

That heretofore defendant moved this court for an order dismissing the first cause of action, which 51
motion was granted, and an order to that effect was entered on the 18th day of July, 1933.

Simultaneously with the making of said motion defendant moved for a stay of the second cause of action pending arbitration as provided in 9 U. S. C. A., Sec. 3. On the 6th day of July 1933 an opinion was handed down by the Honorable William Bondy, which reads as follows:

"Section 3 of the United States Arbitration Act (9 U. S. C. A. Sec. 3) provides for a stay

52 of proceeding if the Court is satisfied that 'the issue involved in such suit' is referable to arbitration under the terms of the contract sued upon. Issues cannot be involved in a suit before an answer has been filed raising them.

"The Motion to stay proceeding is denied without prejudice to a renewal thereof after defendant's answer has been filed.

Dated, July 6, 1933.

WM. BONDY,
U. S. D. J."

53 In conformance with this opinion an order was duly made by Judge Bondy on the 18th day of July 1933, reading as follows:

"ORDERED that said motion be and the same hereby is denied without prejudice to a renewal thereof after the defendant's answer has been duly served and filed, and leave is hereby granted to defendant to serve and file its answer within ten days after the entry herein of this order."

Defendant's answer was served on the 27th day of
54 July 1933 and thereafter duly filed. Copies of the pleadings will be submitted herewith.

Defendant now renews its motion for a stay pending arbitration upon the affidavits and papers submitted on the former motion for the same relief and upon the complaint and answer.

The plaintiff has moved to strike out the first and second separate defenses contained in the answer, and defendant now makes this motion for a stay

pending arbitration returnable at the same time as a matter of convenience. 55

WHEREFORE, deponent prays for an order staying the trial of this action and all proceedings herein until an arbitration has been had in accordance with the terms of an agreement entered into by and between the parties to this action, and referred to in the second cause of action contained in the complaint, and for such other and further relief as to the Court may seem just.

(Sworn to by Ernest E. Wheeler on August 10, 1933.) 56

Notice of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L54—Page 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against— 57

WESTCHESTER SERVICE CORPORATION,

Defendant.

Sirs:

PLEASE TAKE NOTICE, that upon the complaint herein, and upon the affidavit of Gerald S. Couzens, verified the 24th day of March, 1933, and here-

to annexed, upon the affidavit of Abraham H. Elkind, verified the 24th day of March, 1933, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a Stated Term thereof, for the hearing of motions, to be held in and for the Southern District of New York, at the Court House in the United States Post Office Building, located at Broadway and Park Row (Room 235), Borough of Manhattan, City of New York, on the thirty-first day of March, 1933, at ten-thirty o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order as provided in 9 U. S. C. A. §3, staying the trial of this action and all proceedings herein until an arbitration has been had in accordance with the terms of an agreement entered into by and between the parties to this action, and referred to in the complaint; and for such other and further relief as to the Court may seem just.

Dated, New York, N. Y., March 25, 1933.

Yours, etc.,

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for Defendant,
Office and P. O. Address,
20 Exchange Place,
New York, N. Y.

To:

MOOS, NATHAN, IMBREY & LEVINE, ESQS.,
Attorneys for Plaintiff,
500 Fifth Avenue,
New York, N. Y.

Affidavit of Gerald S. Couzens, Read in Support of Motion.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

L54—Page 108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

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State of New York,
County of Westchester—ss.:

GERALD S. COUZENS, being duly sworn, deposes and says that he is the President of Westchester Service Corporation, the defendant herein, and is familiar with facts and circumstances involved in the matters set forth in the complaint in this action. The complaint herein was served on the 28th day of February, 1933. No answer by defendant has been served or filed.

This is a motion to stay all proceedings pending an arbitration between the parties as provided by the terms of a contract entered into between them dated the 22nd day of January, 1931, and referred to in the Second cause of action set forth in the complaint. A true copy of said contract upon which the Second cause of action in the complaint is based is annexed hereto and marked Exhibit "A". Said contract contains the following clause:

63

> "TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agree-

64 ment, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this
65 arbitration agreement in accordance with the arbitration laws of the State of New York."

A dispute has arisen between the Shanferoke Coal & Supply Corporation of Delaware, the plaintiff, and the Westchester Service Corporation, defendant, the parties to said agreement, as to the performance of the terms of the same, as appears from the following facts:

Subsequent to the execution of the agreement and in accordance with the provisions thereof, the defendant herein from time to time ordered the shipment of coal and the plaintiff complied with
66 said orders, to and including the month of December, 1932, during which month between the 17th and 31st days thereof, the defendant gave and the plaintiff accepted and filled orders under the contracts alleged in the complaint for ten cars of coal of a total weight of about 390 tons.

On the 3rd day of January, 1933, the defendant pursuant to the terms of the contract, placed an order for the shipment of seven cars of coal which would contain in excess of 250 tons. A true copy

of said order is hereto annexed and marked Exhibit 67
"B". That thereafter the defendant received from the plaintiff a letter dated January 5, 1933, a true copy of which is hereto annexed and marked Exhibit "C". As appears from this letter, the plaintiff charged the defendant with being in default in the placing of orders under existing contracts and refused to accept the order so placed (Exhibit "B") and to make shipments unless defendant conceded that the acceptance of the same was without prejudice to rights which the plaintiff claimed existed in its favor.

That as appears from the affidavit hereto an- 68
nexed of Abraham H. Elkind, a vice-president of the defendant, the said Elkind, shortly after the receipt of the letter marked Exhibit "C" conversed with one A. T. Goodenough, President of plaintiff, with reference to the same, and urged that the defendant was not in default under the existing contracts and that the orders be accepted as under the contract, without any commitments as to the rights of the parties at that particular time. Said Goodenough in his conversation in substance agreed that he saw no reason why his company should not fill the said order for seven cars of coal and that it would do so. Thereafter defendant received 69
a letter dated January 10, 1933, from one Louis H. Moos, a member of the firm of attorneys now representing the plaintiff, a true copy of which letter is hereto annexed and marked Exhibit "D". As appears from this letter the plaintiff, through its attorneys, has finally declined to ship under the order so given. That on January 11, 1933, and after the receipt by the defendant of said letter marked Exhibit "D", deponent conversed with said A. T.

70 Goodenough and again urged that the order of January 3, 1933, Exhibit "B", be accepted so that defendant might fulfill its obligations under existing contracts with the plaintiff, and that said Goodenough in substance stated his willingness to fill said order but that a contrary decision had been made by others. Prior to the giving of the order for the seven cars as above stated, deponent on behalf of defendant, had some discussion with the officers of the plaintiff, as to the provision of said contract contained in the First paragraph thereof, referring to the spreading over the period of the
71 contract of the orders for said coal and the delivery thereof, and that no claim was made on the part of the plaintiff in any of said conversations or otherwise prior to January 5, 1933, that defendant was in default in purchasing coal under its agreement with the plaintiff.

From all of the foregoing, and from the fact that this action has been instituted, it fully appears that a dispute has arisen between the buyer and the seller as to the performance of the terms of the agreement.

Deponent on behalf of his company, has discussed with the officers of the plaintiff, the arbi-
72 tration of this dispute and has always stood ready and willing to arbitrate the same in accordance with the provisions of the contract, and the defendant is in no way in default in proceeding with said arbitration.

The defendant is now ready and willing, and has always been ready and willing to comply with all of the terms of said contract, and to order and accept within the period set out in the contract, the amount of coal required to be so ordered.

Affidavit of Gerald S. Couzens.

This contract has about three years still to run, 73
and deponent respectfully calls the attention of the Court to the fact that, due to the refusal of the plaintiff to accept its orders, it is prevented from complying with the terms of the contract, and is thus deprived of the opportunity of relieving itself of any possible liability to the plaintiff which may now or in the future exist.

Deponent believes that the dispute which has arisen is of the nature contemplated by the agreement and of the kind which may be most promptly and justly settled by arbitration. As appears from said contract the same evidences a transaction involving commerce among the several states as 74
defined by the Federal Statute establishing the validity, irrevocability and enforcement of agreements to arbitrate.

WHEREFORE, deponent prays that an order may enter herein, staying the trial of this action and all proceedings herein, until an arbitration has been had in accordance with the terms of said agreement, and deponent further prays for an order extending the defendant's time to answer until ten days after the entry of an order on this application if the same shall be denied. 75

(Sworn to by Gerald S. Couzens on March 24, 1933.)

EXHIBIT "A", ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS.

76 THIS AGREEMENT made, entered into and executed in triplicate on this 22nd day of January, 1931, by and between SHANFEROKE COAL AND SUPPLY CORPORATION OF DELAWARE, a Delaware corporation with its principal office and place of business in the City of New York, State of New York, hereinafter called the "Seller," party of the first part, WESTCHESTER SERVICE CORPORATION, a New York corporation having its principal office and place of business in the City of Yonkers, State of New York, hereinafter called "Buyer," party of the
77 second part, and the S. FOY COAL COMPANY, INC., a New York corporation, with its principal office and place of business in the City of New York, State of New York, hereinafter called the "Foy Company," party of the third part.

WITNESSETH:

WHEREAS, the Seller is engaged in the wholesale fuel business and is affiliated with the Foy Company, which is engaged in the retail fuel business in the cities of New York and Yonkers; and

78 WHEREAS, the Buyer is engaged in the retail fuel business in the City of Yonkers and the vicinity and desires to secure from the Seller certain additional tonnage of anthracite in the amount and in accordance with the terms and conditions hereinafter stated, and to secure from the Foy Company that company's good will in the city of Yonkers; and

WHEREAS, the Seller is willing to supply the tonnage hereinafter provided for and the Foy Com-

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

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pany is willing to dispose of its fuel business in the city of Yonkers, all in accordance with the terms and conditions stated.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto hereby agree as follows:

FIRST: The Seller agrees to sell and deliver to the Buyer and the Buyer agrees to purchase from the Seller, f.o.b., railroad cars at the mines of The Hudson Coal Company, in Pennsylvania, during a period of not less than three years or more than 80
five years, beginning on the date of this agreement, seventy-five thousand (75,000) gross tons (2,240 lbs.) of anthracite, in the sizes of grate, egg, stove, chestnut, pea and buckwheat in the proportions in which said sizes are produced by said The Hudson Coal Company (it being understood between the parties that the Seller will furnish said sizes in the proportions demanded by the Buyer's retail customers, provided such demand be reasonably within the proportions in which said sizes are produced by The Hudson Coal Company) at the prices and upon the terms and conditions herein- 81
after set forth. It is expressly understood and agreed that the Buyer will order and accept delivery of said anthracite, during such period, in as nearly equal monthly installments as is practicable; it being intended that the delivery of said anthracite by the Seller and its acceptance by the Buyer shall be spread over such period of not less than three years or more than five years in as even a manner as is practicable.

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

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SECOND: The Seller agrees that all of said anthracite shall be of the current standard of preparation and size.

THIRD: The Seller agrees to deliver said anthracite from time to time, during such period, on railroad cars at the mines of The Hudson Coal Company, in Pennsylvania, upon the Buyer's orders when and as the same are received by the Seller and, at the request of the Buyer to act as agent for the buyer in consigning and waybilling said anthracite as the Buyer shall direct. It is
83 agreed that the Seller shall assume no responsibility whatsoever in connection with such arrangements with the transportation companies or for any default on the part of the transportation companies.

FOURTH: The prices to be charged by the Seller and paid by the Buyer for said anthracite sold and delivered, pursuant to the terms of this agreement, shall be the "Seller's circular prices" for anthracite of the sizes purchased by the Buyer in effect at the time shipment is made, provided, however, that if the "Seller's circular prices" for the size or
84 sizes of anthracite purchased by the Buyer at the time of any shipment shall be higher than the then average current circular prices for anthracite of the same size or sizes computed on an f.o.b., mine basis charged by the Delaware, Lackawanna and Western Coal Company (or whoever may market the anthracite produced from the mines now owned by the Glen Alden Coal Company), the Lehigh Valley Coal Sales Company and The Pittston Company, then the prices to be charged by the Seller

and paid by the Buyer for any such shipment shall be the average current circular prices of said three companies for anthracite of the sizes purchased in effect at the time of such shipment. For the purpose of this agreement the term "Seller's circular prices" shall mean the current circular prices of the Seller for anthracite in the sizes hereinbefore referred to, computed on an f.o.b., mine basis. 85

FIFTH: The Buyer agrees to pay for all anthracite purchased by it during any calendar month of the period of this agreement, in full in New York funds on the twenty-fifth day of the month succeeding the month in which deliveries of such anthracite f.o.b., mines are made to the Buyer by the Seller. If the Seller shall extend to its customers generally longer terms of credit than herein set forth, the Buyer shall be entitled to the benefit of such longer terms in paying for coal purchased under this contract. 86

SIXTH: Deliveries by the Seller and acceptance by the Buyer under this agreement are subject to any one or more of the following causes, viz., fire, flood, strikes, war, insurrections, or mob violence and to the extent that the Seller is prevented from making delivery of the coal sold hereunder by any of the foregoing causes shall be relieved from liability for damages or failure arising therefrom and shall not be obligated to make up nor shall the Buyer be obligated to receive any tonnage deficiency arising therefrom. 87

SEVENTH: It is agreed by the Buyer that in the event the terms and provisions of this agreement,

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

or any of them, are not fully and completely performed and observed by it, the Seller may, at its option, terminate this agreement and thereupon the Buyer agrees to pay to the Seller the sum of Ten Thousand Dollars ($10,000.00) as liquidated damages; which sum shall be in full settlement and discharge of all the buyer's obligations under this contract except any indebtedness for coal previously purchased.

A. E. S.
G. S. C.
L. A. D.

EIGHTH: The Foy Company agrees to and does hereby sell, assign, transfer and convey to the Buyer, its good will in the fuel business now being conducted by it in the city of Yonkers, and agrees to assign to the Buyer all its right, title and interest in (1) a certain lease, dated April 4, 1929, between David E. Allen Yonkers Foundry, Inc., as lessor, and the S. Foy Coal Company, Inc., as lessee, and (2) a certain lease, dated November 1, 1929, between The New York Central Railroad Company, as lessor, and the S. Foy Coal Company, Inc., as lessee, in consideration of the assumption by the Buyer of all the obligations of the said lessee under said leases, and an agreement by the Buyer to indemnify and save harmless the Foy Company from any claim against the Foy Company, its successors or assigns, incident to the said leases; it being understood and agreed that the Foy Company will secure the consents of the lessors to the assignments of said leases to the Buyer, and will thereafter execute and deliver to the Buyer, suitable instruments of assignment of said leases; said instruments to contain said assumption of obligations of the lessee thereunder by the Buyer, and said indemnification of the Foy

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

Company by the Buyer, and to be executed both by the Foy Company and the Buyer. 91

NINTH: It is understood and agreed by and between the parties hereto that the Buyer shall have the right to use the name "Foy Fuel Company," in the conduct of its retail anthracite business in the city of Yonkers; that the Buyer agrees not to do any business of any nature whatsoever in said name, or in any other name with the name "Foy" therein, outside of the city of Yonkers, New York, and that the Foy Company agrees not to conduct any retail anthracite business in the city of Yonkers, New York. 92

TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York. 93

ELEVENTH: This agreement shall be binding upon the successors of the parties hereto, but shall

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not be assigned by either party without the consent of the other party being given in writing.

IN WITNESS WHEREOF, the parties hereto have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed and attested by their proper officers thereunto duly authorized, the day and year first above written.

SHANFEROKE COAL AND SUPPLY CORPORATION OF DELAWARE,

95 By A. E. SLOAT, Vice-President.

Attest: STUART BAVIER,
(Seal) Secretary.

WESTCHESTER SERVICE CORPORATION,

By G. S. COUZENS, President.

Attest: J. W. OBRIST,
(Seal) Assistant Treasurer.

S. FOY COAL COMPANY, INC.,

96 By LEO A. DOBBINS, President.

Attest: STUART BAVIER,
(Seal) Secretary.

Approved as to form,
THOMAS L. ERMIS,
Attorney.
1/15/31

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

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State of New York,
County of New York—ss.:

On the 22d day of January, One thousand nine hundred and thirty-one, before me personally appeared A. E. Sloat, to me known, who, being by me duly sworn, did depose and say that he resides in the Town of Montclair, New Jersey; that he is Vice-President of Shanferoke Coal and Supply Corporation of Delaware, one of the corporations described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instru- 98
ment is such corporate seal; that it was so affixed by order of its Board of Directors, and that he signed his name thereto by like order.

CELIA SACHS,
Notary Public,
New York County No. 8.
New York Register No. 2-S-126.
My Commission expires March 30, 1932.

State of New York, 99
County of New York—ss.:

On the 21st day of January, One thousand nine hundred and thirty-one, before me personally appeared G. S. Couzens; to me known, who, being by me duly sworn, did depose and say that he resides in Yonkers, N. Y., that he is President of Westchester Service Corporation, one of the corporations described in and which executed the foregoing

Exhibit "A", Annexed to Affidavit of Gerald S. Couzens.

100 instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of its Board of Directors, and that he signed his name thereto by like order.

G. F. ROHLING,
Notary Public,
Notary Public, Westchester County, N. Y.
Term Expires March 30, 1932.

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101 State of New York,
County of New York—ss.:

On the 20th day of January, One thousand nine hundred and thirty-one, before me personally appeared Leo A. Dobbins, to me known, who, being by me duly sworn, did depose and say that he resides in Armonk, N. Y.; that he is President of the S. Foy Coal Company, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the corporate seal of said
102 corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of its Board of Directors, and that he signed his name thereto by like order.

ROBERT GRANER,
Notary Public,
Westchester County,
Cert. filed in Bronx Co. No. 23.
Cert. filed in N. Y. Co. No. 1193.
Commission expires March 30, 1934.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS.

WESTCHESTER SERVICE CORPORATION
Manufacturers and Distributors
ICE—COAL—FUEL OIL—BUILDERS' SUPPLIES
General Offices: 435 South Broadway

Yonkers, N. Y., Jan. 3rd, 1933

Purchasing Department
Ship to Westchester Service Corp'n.,
Care of Westside Division,
Oak & West Street,
Purchase Order No. 7837
At Mt. Vernon, New York.
Requisition No.
Via N.Y.C.—Harlem Division

Shanferoke Coal & Supply Co.,
521 Fifth Avenue,
New York City.

MAILING INSTRUCTIONS
Forward 2 copies of invoice; also bill of lading and copies of packing list to 435 South Broadway, Yonkers, N. Y.

Purchase Order Number and Destination of Shipment Must Appear on all Invoices

Terms F.O.B. Mines

Quantity	Unit	
3	cars	D & H Stove Coal
3	"	D & H Nut Coal
1	"	D & H Pea Coal

A/C Contract.

J. H. Z.
Purchasing Agent

EXHIBIT C, ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS

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SHANFEROKE COAL AND SUPPLY CORPORATION

OF DELAWARE

521 Fifth Ave., New York

Arthur C. Wadley
Chairman of the Board

Arthur T. Goodenough
President

Arch E. Sloat
Vice President

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Stuart Bavier
Secretary and Treasurer

January 5, 1933.

Westchester Service Corporation,
395 South Broadway,
Yonkers, New York.

Gentlemen:—

We are in receipt of your order for seven cars of coal under pending contracts.

108 The writer has already called to your attention on various occasions that you have been for a considerable time in default in the placement of orders under the two existing contracts. Accordingly, we find it impossible under existing conditions to accept your order and ship same unless it is clearly understood that such acceptance and shipment are without prejudice to our rights as they exist at the present time.

If it is thoroughly understood that the acceptance and shipment of this order are without waiver

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of any of our rights to enforce the two contracts and that such acceptance and shipment shall not be deemed or understood to be an admission on our part that you have been excused from strict compliance with the performance of the contracts in question, we shall be glad to accept and ship the present order.

Very truly yours,

A. GOODENOUGH
President

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EXHIBIT D, ANNEXED TO AFFIDAVIT OF GERALD S. COUZENS.

Law Offices
MOOS, NATHAN, IMBREY & LEVINE
Telephone Pennsylvania 6-3020
Cable Address "BREYIM"

Louis H. Moos
Alfred B. Nathan
S. Howard Imbrey
George X. Levine

500 Fifth Avenue, New York 111
Jan. 10, 1933.

Westchester Service Corporation,
395 South Broadway,
Yonkers, N. Y.

Dear Sirs:

Shanferoke Coal & Supply Corporation of Delaware and the Hudson Coal Company have consulted us concerning the two contracts made by

Exhibit D, Annexed to Affidavit of Gerald S. Couzens.

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you with them and have further advised us of the facts in relation to your breach of these contracts.

Our clients have placed before us your order No. 7837, dated January 3, 1933, together with a copy of the letter sent you by the Shanferoke Coal & Supply Corporation, dated January 5, 1933. Mr. Goodenough, the president of the Shanferoke Coal & Supply Corporation, has told us that your Mr. Elkind phoned him today and stated in substance that your company would not acquiesce in the sug-

113 gestion made in the letter of the 5th inst., but, on the contrary, took the position that the order for seven cars of coal was sent under the contracts and that our clients could either ship same under the contracts or cancel the order. In view of the circumstances, we have advised our clients that it would be inadvisable to ship the coal on this order.

Our clients have now instructed us to take such action as we may deem advisable in the premises.

Very truly yours,

(Signed) LOUIS H. MOOS.

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Affidavit of Abraham H. Elkind, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK. 115

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

State of New York,
City of Yonkers,
County of Westchester—ss.:

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ABRAHAM H. ELKIND, being duly sworn, deposes and says that he is a vice-president of Westchester Service Corporation, the defendant in this action.

That subsequent to the receipt of plaintiff's letter, dated January 5, 1933, being Exhibit "C" referred to in the annexed affidavit of Gerald S. Couzens, deponent talked with Mr. A. T. Goodenough, president of the plaintiff, about the said letter and the defendant's order dated January 3, 1933, for seven cars of coal, being Exhibit "B" referred to in the said affidavit of Gerald S. Couzens. That deponent in said conversation in substance stated to the said A. T. Goodenough 117 that under defendant's understanding of the intent and effect of the two contracts mentioned in said letter the defendant was not then in default in placing orders, that defendant desired to fulfill its obligations under the said contracts, and urged that until the dispute as to the question of any existing default on the part of the defendant had been settled in the proper manner, the plaintiff accept the defendant's said order dated January 3, 1933 for seven cars of coal and apply the same against the coal which defendant was required to

118 purchase under the said contracts. That the said A. T. Goodenough in the said conversation in substance stated to deponent that he saw no reason why the order could not be accepted by the plaintiff and applied as a purchase under the existing contracts and that it would be so accepted and the coal ordered would be shipped in due course.

That the said order was not accepted by plaintiff and the coal covered by said order was not shipped by it and that defendant was compelled to purchase it from others.

(Sworn to by Abraham H. Elkind on March 24,
119 1933.)

Answering Affidavit of A. T. Goodenough, Read in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

120 WESTCHESTER SERVICE CORPORATION,

Defendant.

State of New York,
County of New York,
Southern District of New York—ss.:

A. T. GOODENOUGH, being duly sworn, deposes and says: That he is the president of the plaintiff corporation, and fully familiar with all facts and circumstances involved herein.

Answering Affidavit of A. T. Goodenough.

That he has read the affidavits of Gerald S. Couzens and Abraham H. Elkind, sworn to March 24th, 1933, and the affidavit of Ernest E. Wheeler, sworn to August 10th, 1933, in support of defendant's motion for a stay, and makes this affidavit in opposition thereto. 121

Although defendant contends that arbitration should be had under the contract involved in the second cause of action, it fails to state the specific matters or issues which it seeks to arbitrate, or which could be arbitrated. The fact is, that there are no disputes or controversies between the parties, which could be properly referred to arbitration. 122

Under the terms of the agreement of January 22nd, 1931, upon which the second cause of action is based, defendant became obligated to purchase from plaintiff, during a period of not less than three years or more than five years from the date of the agreement, 75,000 gross tons (of 2240 lbs. to the ton) anthracite coal, consisting of certain sizes, in the proportions in which said sizes would be produced by the Hudson Coal Company, it being further agreed that defendant would order and accept delivery of said coal, during said period, in as nearly equal monthly installments as practicable. Defendant, however, failed to comply with the requirements of this agreement. Thus, defendant was in default to the extent of approximately 16,173 gross tons of coal when this suit was instituted in March, 1933, even on the basis of a five year term. 123

Defendant first began to fall behind its quota in the winter of December, 1931. Its default became more evident in the spring of 1932. Deponent thereupon communicated with defendant's vice-

124 president, Mr. Elkind, and called his attention to the fact that defendant was not living up to its agreement and that it was far behind in its quota.

Mr. Elkind admitted that defendant had not been ordering and purchasing coal in the quantities required by its said contract, but explained that defendant's failure to do so was due to business conditions, and promised that defendant would make up the arrears in the fall, when conditions were expected to improve.

Thereafter, defendant continued in default. In September, 1932, deponent again communicated
125 with Mr. Elkind and called the latter's attention to the situation, pointing out that defendant was in arrears in the quantity of coal that it was obliged to order and purchase from plaintiff. Mr. Elkind gave deponent further assurance that defendant would make up its arrears shortly.

These assurances were not carried out, and in December, 1932, at which time defendant was substantially in default under its said contract, deponent arranged a conference with Mr. Elkind at the latter's office, for the purpose of discussing the situation with a view towards having defendant make up its arrears, in accordance with the prom-
126 ises and assurances theretofore given.

This conference was held on December 5th, 1932. Present at the meeting with deponent, was Mr. Hayes, plaintiff's New York sales manager, whose affidavit is hereto annexed. Mr. Couzens was also present during part of the meeting.

At this conference, deponent again pointed out that defendant was far behind its quota and requested that immediate arrangements be made, in

accordance with the assurance theretofore given, to 127
eliminate the arrears. *Mr. Elkind, after some discussion, stated that the true reason for defendant's continued failure to purchase coal from plaintiff in compliance with its contract, was that defendant could obtain coal from other sources at prices lower than those required to be paid by the terms of the contract between plaintiff and defendant. Mr. Elkind stated further that, unless plaintiff agreed to modify the existing contract by reducing the price of its coal, defendant would not order or purchase any coal from plaintiff.*

Despite deponent's attempt to persuade Mr. 128
Elkind that defendant live up to the terms of its contract, the latter refused to change his postion and asserted that defendant could not and would not purchase any coal from plaintiff unless the prices required to be paid under the agreement were reduced. Deponent, after consultation with his associates, found that no such arrangement could be made, and, finally, so advised Mr. Elkind.

Thereafter, defendant continued in default under its said agreement and failed to order or purchase any coal from plaintiff, with the exception of one order of January 3rd, 1933, for a small quantity of coal. Defendant, at this time, was substantially in 129
default under its said contract.

Plaintiff, however, was willing to fill this order on condition that its acceptance of the order be without prejudice to plaintiff's rights under the contracts. Defendant, however, refused to accede to this request, and accordingly, the shipment could not be effectuated.

130 The purported substance of the conversation between deponent and Mr. Elkind, upon the latter's receipt of plaintiff's letter dated January 5th, 1933 (Exh. C), as recited in the moving papers, is grossly inaccurate. Mr. Elkind made no assertion during said conversation, either in words or substance, that defendant was not in default in placing orders and did not urge, as now claimed, that the question of any existing default be settled in a proper manner. Nor did deponent state, as claimed in the moving papers, that he saw no reason why the order (of January 3rd, 1933) could not be ac-
131 cepted by plaintiff and applied as a purchase under the existing contract and that it would be so accepted and coal shipped in due course.

Mr. Elkind, in substance, stated that his concern would not acquiesce to the conditions referred to in deponent's letter of January 5th, 1933 (Exh. C), and that plaintiff could either ship the coal or cancel the order. Deponent informed Mr. Elkind that plaintiff could not make the shipment except without prejudice to its rights. A letter confirming this position was sent to defendant by plaintiff's counsel on January 10th, 1933 (Exh. D). In view of the contents of this letter, it is evident that the moving
132 papers do not state correctly the substance of deponent's talk with Mr. Elkind.

Mr. Couzen's statement at page 3 of his affidavit that, after receipt by defendant of said letter, deponent expressed a willingness to fill defendant's order of January 3rd, 1933, but stated that a contrary decision had been made by others, is inaccurate. Deponent merely advised Mr. Couzens that he was willing to fill the order, but only upon the

condition that it be deemed without prejudice to 133
plaintiff's rights.

It is evident from the foregoing circumstances that there is no actual denial that defendant is in default under its said agreement with plaintiff. In this regard, it should be noted that nowhere in the moving papers does there appear any unequivocal assertion that defendant is not in default under its said agreement. On the other hand, the facts hereinabove adverted to, show clearly that defendant was in default to the extent of approximately 16,-173 gross tons of coal, when this action was commenced, and that it has repudiated its agreement 134
with plaintiff and has definitely taken the unjustifiable position that it will not perform its contract, unless plaintiff complies with its arbitrary demand for a reduction in price.

Manifestly, under the circumstances, there is not and cannot be any dispute or controversy between the parties that can be referred to arbitration. Defendant's default is so evident, and apparently is not denied, that there is no arbitrable dispute or controversy in that regard. Certainly, defendant cannot arbitrarily demand a modification of the agreement and upon such demand being declined, refuse to abide by the terms of the agree- 135
ment, and then seek arbitration. Under such circumstances there is no dispute and there is nothing to arbitrate.

The only question left for determination, is the amount of damages sustained by plaintiff as a result of defendant's breach of contract. This question, however, cannot be determined by arbitration. A mere assessment of damage, divorced from the determination of any other dispute between the parties, does not fall within the purview of

136 arbitration. The arbitration law of the State of New York, as deponent has been advised by plaintiff's attorneys and verily believes, does not extend to or include within its embracement assessments of damage, appraisals or the like, where such matters constitute the sole issue between the parties.

Since it appears clearly that there is no arbitrable dispute between the parties, it is evident that arbitration could not be had. It follows, therefore, that defendant is not entitled to stay proceedings. The granting of a stay until arbi-
137 tration is had, obviously, would be a futility and improper, where it appears, as it does in the present case, that there is no dispute which can be arbitrated. Hence, for this reason alone, defendant's application should be denied.

There is a further objection which deponent believes is fatal to defendant's motion. The agreement upon which defendant bases its right to arbitration and to a stay, provides for arbitration in accordance with the arbitration laws of the State of New York. Consequently, arbitration, if had, would proceed solely in accordance with the requirements of the New York statute relating to
138 arbitration. Deponent submits that this Court has no jurisdiction to compel the parties to arbitrate in accordance with the laws of the State of New York, since that statute is purely remedial and created no substantive rights that could be enforced by a Federal Court. Since this Court would have no jurisdiction to compel arbitration in the instant case, it follows that it has no jurisdiction to stay proceedings until arbitration is had. And as a matter of law, deponent has been ad-

vised by plaintiff's attorneys and verily believes, 139
this Court may not grant a stay under the provisions of the New York Arbitration Law.

Furthermore, it is submitted that defendant is estopped from seeking arbitration or a stay of proceedings in connection therewith, due to the fact that it has appeared and participated, on the merits, in this litigation. Thus, defendant heretofore served a notice of general appearance, by its present attorneys, in this action, and obtained several stipulations extending its time to answer to the complaint herein. Defendant also has moved to dismiss the first cause of action contained in the complaint herein, on the alleged ground that the 140
same fails to state facts sufficient to constitute a cause of action. In addition, defendant has now served an answer to the complaint. Under these circumstances, it is clear that defendant has waived any right it may have had to demand arbitration.

It should be noted further that defendant seeks a stay of the trial of this action and all proceedings herein, until arbitration has been had in accordance with the terms of the aforementioned agreement, a copy of which is annexed to the moving papers. This agreement is the one upon which plaintiff's second cause of action is predicated, 141
and provides for arbitration of disputes arising thereunder. The agreement does not cover disputes between the parties arising out of or in connection with other agreements or circumstances. It is apparent, therefore, that, under this agreement, defendant cannot seek to compel arbitration of any controversy between the parties arising out of the

142 agreement referred to in plaintiff's first cause of action. This point is urged because plaintiff intends to and will appeal from the order and judgment dismissing its first cause of action, and, therefore, does not desire to be prejudiced in the enforcement thereof, should it succeed on its appeal.

The agreement for the sale of coal, upon which the first cause of action is based, is an entirely different agreement, and is prior in date to that upon which the second cause of action is predicated. Defendant does not seek arbitration under this prior agreement. Consequently, defendant, under
143 any circumstances, is not entitled to stay proceedings in so far as plaintiff's first cause of action is concerned.

It is submitted, however, that defendant has failed to make out a proper case for arbitration, and, therefore, that it is not entitled to the incidental relief now sought.

WHEREFORE, deponent respectfully prays that defendant's motion for a stay be denied in all respects.

(Sworn to by A. T. Goodenough on August 30,
144 1933.)

Answering Affidavit of Mark J. Hayes, Read in Opposition to Motion.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

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State of New York,
County of New York,
Southern District of New York—ss.:

MARK J. HAYES, being duly sworn, deposes and says: That he is the New York sales manager for the plaintiff corporation, and was present at the conference of December 5th, 1932, referred to in the annexed affidavit of A. T. Goodenough, sworn to the 30th day of August, 1933.

That deponent has read the said affidavit, and that the statements therein contained, concerning 147
the said conference and the conversation had thereat, are true.

(Sworn to by Mark J. Hayes on August 30, 1933.)

Answering Affidavit of Benjamin Lewis, Read in Opposition to Motion.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

149 State of New York,
County of New York,
Southern District of New York—ss.:

BENJAMIN LEWIS, being duly sworn, deposes and says: That he is an attorney associated with Moos, Nathan, Imbrey & Levine, the attorneys for the plaintiff in the above action, and that he is familiar with the facts and circumstances involved and proceedings had herein.

Deponent desires to call the Court's attention to the fact that the statements contained in plaintiff's answering affidavit, concerning defendant's
150 default and repudiation of its agreement, are neither explained nor denied by defendant. The latter's failure to take issue with plaintiff's statements regarding defendant's default and repudiation of its contract, is highly significant, in view of the fact that heretofore, in April, 1933, on the argument of the defendant's prior motion for a stay of proceedings, deponent gave defendant's attorney a copy of plaintiff's answering affidavit, which was substantially similar in content to plaintiff's present answering affidavit.

It is apparent, therefore, that defendant, at the 151
time it renewed its motion for a stay, was fully familiar with the nature of plaintiff's contentions regarding defendant's default and repudiation of its agreement. Defendant's failure to take issue with plaintiff's contentions, in this connection, or to make any explanation in regard thereto, must be deemed an admission of the truth of plaintiff's charges. Under the circumstances, it is clear that there is no bona fide dispute concerning the performance of the contract which is referable to arbitration. It follows, therefore, that defendant is not entitled to a stay of proceedings until arbi- 152
tration is had.

Deponent desires to call the Court's attention, also, to the fact that defendant, despite its alleged readiness and willingness to arbitrate, has neglected to show that it took any affirmative steps to compel arbitration. Defendant does not claim that it appointed, or sought to appoint an arbitrator, or that it ever demanded arbitration.

Furthermore, it should be noted that, although more than three months have elapsed since defendant's first application for a stay of proceedings, defendant has failed to take any affirmative steps to compel arbitration, either in the State Court or 153
the Federal Court. In fact, defendant has at no time made any application to compel arbitration. Defendant's failure to take any affirmative steps to compel arbitration, although, admittedly, it has had more than ample opportunity to do so, must be considered as a waiver of any rights on its part under the arbitration clause. The fact that, even now, defendant seeks only a stay, and does not attempt to compel arbitration, shows clearly that

154 defendant is interested in gaining delay only and that it never really desired to arbitrate.

WHEREFORE, deponent respectfully prays that defendant's application for a stay be denied in all respects.

(Sworn to by Benjamin Lewis on September 1, 1933.)

Answering Affidavit of A. T. Goodenough, Read in Opposition to Motion.

155 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

State of New York,
County of New York,
156 Southern District of New York—ss.:

A. T. GOODENOUGH, being duly sworn, deposes and says: That he is the president of the plaintiff corporation, and fully familiar with all facts and circumstances involved herein.

That he has read the affidavits of Gerald S. Couzens and Abraham H. Elkind, sworn to March 24th, 1933, in support of defendant's motion for a stay, and makes this affidavit in opposition thereto.

Although defendant contends that arbitration 157
should be had under the contract involved in the second cause of action, it fails to state the specific matters or issues which seeks to arbitrate, or which could be arbitrated. The fact is, that there are no disputes or controversies between the parties, which could be properly referred to arbitration.

Under the terms of the agreement of January 22nd, 1931, upon which the second cause of action is based, defendant became obligated to purchase from plaintiff, during a period of not less than three years or more than five years from the date 158
of the agreement, 75,000 gross tons (of 2,240 lbs. to the ton) of anthracite coal, consisting of certain sizes, in the proportions in which said sizes would be produced by the Hudson Coal Company, it being further agreed that defendant would order and accept delivery of said coal, during said period, in as nearly equal monthly installments as practicable. Defendant, however, failed to comply with the requirements of this agreement. Thus, defendant was in default to the extent of approximately 16,173 gross tons of coal when this suit was instituted in March, 1933.

Defendant first began to fall behind its quota 159
in the winter of December, 1931. Its default became more evident in the spring of 1932. Deponent thereupon communicated with defendant's vice-president, Mr. Elkind and called his attention to the fact that defendant was not living up to its agreement and that it was far behind in its quota.

Mr. Elkind admitted that defendant had not been ordering and purchasing coal in the quantities required by its said contract, but explained

160 that defendant's failure to do so was due to business conditions, and promised that defendant would make up the arrears in the fall, when conditions were expected to improve.

Thereafter, defendant continued in default. In September, 1932, deponent again communicated with Mr. Elkind and called the latter's attention to the situation, pointing out that defendant was in arrears in the quantity of coal that it was obliged to order and purchase from plaintiff. Mr. Elkind gave deponent further assurance that defendant would make up its arrears shortly.

161 These assurances were not carried out, and in December, 1932, at which time defendant was substantially in default under its said contract, deponent arranged a conference with Mr. Elkind at the latter's office, for the purpose of discussing the situation with a view towards having defendant make up its arrears, in accordance with the promises and assurances theretofore given.

This conference was held on December 5th, 1932. Present at the meeting with deponent, was Mr. Hayes, plaintiff's New York sales manager, whose affidavit is hereto annexed. Mr. Couzens was also present during part of the meeting.

162 At this conference, deponent again pointed out that defendant was far behind its quota and requested that immediate arrangements be made, in accordance with the assurances theretofore given, to eliminate the arrears. Mr. Elkind, after some discussion, stated that the true reason for defendant's continued failure to purchase coal from plaintiff in compliance with its contract, was that defendant could obtain coal from other sources at prices lower than those required to be paid by the

terms of the contract between plaintiff and de- 163
fendant. Mr. Elkind stated further that, unless plaintiff agreed to modify the existing contract by reducing the price of its coal, defendant would not order or purchase any coal from plaintiff,

Despite deponent's attempt to persuade Mr. Elkind that defendant live up to the terms of its contract, the latter refused to change his position and asserted that defendant could not and would not purchase any coal from plaintiff unless the prices required to be paid under the agreement were reduced. Deponent, after consultation with his associates, found that no such arrangement 164
could be made, and, finally, so advised Mr. Elkind.

Thereafter defendant continued in default under its said agreement and failed to order or purchase any coal from plaintiff, with the exception of one order of January 3rd, 1933, for a small quantity of coal. Defendant, at this time, was substantially in default under its said contract.

Plaintiff, however, was willing to fill this order on condition that its acceptance of the order be without prejudice to plaintiff's rights under the contracts. Defendant, however, refused to accede to this request, and, accordingly, the shipment 165
could not be effectuated.

The purported substance of the conversation between deponent and Mr. Elkind, upon the latter's receipt of plaintiff's letter dated January 5th, 1933 (Exh. C), as recited in the moving papers, is grossly inaccurate. Mr. Elkind made no assertion during said conversation, either in words or substance, that defendant was not in default in placing orders and did not urge, as now claimed, that the question of any existing default be settled in

166 a proper manner. Nor did deponent state, as claimed in the moving papers, that he saw no reason why the order (of January 3rd, 1933) could not be accepted by plaintiff and applied as a purchase under the existing contract and that it would be so accepted and coal shipped in due course.

Mr. Elkind, in substance, stated that his concern would not acquiesce to the conditions referred to in deponent's letter of January 5th, 1933 (Exh. C), and that plaintiff could either ship the coal or cancel the order. Deponent informed Mr. Elkind that plaintiff could not make the shipment except
167 without prejudice to its rights. A letter confirming this position was sent to defendant by plaintiff's counsel on January 10th, 1933 (Exh. D). In view of the covenants of this letter, it is evident that the moving papers do not state correctly the substance of deponent's talk with Mr. Elkind.

Mr. Couzen's statement at page 3 of his affidavit that, after receipt by defendant of said letter, deponent expressed a willingness to fill defendant's order of January 3rd, 1933, but stated that a contrary decision had been made by others, is inaccurate. Deponent merely advised Mr. Couzens that he was willing to fill the order, but only upon
168 the condition that it be deemed without prejudice to plaintiff's rights.

It is evident from the foregoing circumstances that there is no actual denial that defendant is in default under its said agreement with plaintiff. In this regard, it should be noted that nowhere in the moving papers does there appear any unequivocal assertion that defendant is not in default under its said agreement. On the other hand, the facts hereinabove adverted to, show clearly that defendant was in default to the extent of approximately

16,173 gross tons of coal, when this action was 169
commenced, and that it has repudiated its agreement with plaintiff and has definitely taken the unjustifiable position that it will not perform its contract, unless plaintiff complies with its arbitrary demand for a reduction in price.

Manifestly, under the circumstances, there is not and cannot be any dispute or controversy between the parties that can be referred to arbitration. Defendant's default is so evident, and apparently is not denied, that there is no arbitrable dispute or controversy in that regard. Certainly, defendant cannot arbitrarily demand a modification of the agreement and upon such demand being 170
declined, refuse to abide by the terms of the agreement, and then seek arbitration. Under such circumstances there is no dispute and there is nothing to arbitrate.

The only question left for determination, is the amount of damages sustained by plaintiff as a result of defendant's breach of contract. This question, however, cannot be determined by arbitration. A mere assessment of damage, divorced from the determination of any other dispute between the parties, does not fall within the purview of arbitration. The arbitration law of the State of New 171
York, as deponent has been advised by plaintiff's attorneys and verily believes, does not extend to or include within its embracement assessments of damage, appraisals or the like, where such matters constitute the sole issue between the parties.

Since it appears clearly that there is no arbitrable dispute between the parties, it is evident that arbitration could not be had. It follows, therefore, that defendant is not entitled to stay proceedings. The granting of a stay until arbitration is had,

172 obviously, would be a futility and improper, where it appears, as it does in the present case, that there is no dispute which can be arbitrated. Hence, for this reason alone, defendant's application should be denied.

There is a further objection which deponent believes is fatal to defendant's motion. The agreement upon which defendant bases its right to arbitration and to a stay, provides for arbitration in accordance with the arbitration laws of the State of New York. Consequently, arbitration, if had, would proceed solely in accordance with the requirements of the New York statute relating to
173 arbitration. Deponent submits that this Court has no jurisdiction to compel the parties to arbitrate in accordance with the laws of the State of New York, since that statute is purely remedial and created no substantive rights that could be enforced by a Federal Court. Since this Court would have no jurisdiction to compel arbitration in the instant case, it follows that it has no jurisdiction to stay proceedings until arbitration is had.

Furthermore, it is submitted that defendant is estopped from seeking arbitration or a stay of pro-
174 ceedings in connection therewith, due to the fact that it has appeared and participated, on the merits, in this litigation. Thus, defendant heretofore served a notice of general appearance, by its present attorneys, in this action, and obtained several stipulations extending its time to answer to the complaint herein. Defendant also has moved to dismiss the first cause of action contained in the complaint herein, on the alleged ground that the same fails to state facts sufficient to constitute a cause of action. Under these circumstances, it is clear that defendant has waived any right it may have had to demand arbitration.

It should be noted further that defendant seeks a 175
stay of the trial of this action and all proceedings herein, until arbitration has been had in accordance with the terms of the aforementioned agreement, a copy of which is annexed to the moving papers. This agreement is the one upon which plaintiff's second cause of action is predicated, and, provides for arbitration of disputes arising thereunder. The agreement does not cover disputes between the parties arising out of or in connection with other agreements or circumstances. It is apparent, therefore, that, under this agreement, defendant cannot seek to compel arbitration of any controversy between the parties arising out of the agree- 176
ment referred to in plaintiff's first cause of action.

The agreement for the sale of coal, upon which the first cause of action is based, is an entirely different agreement, and is prior in date to that upon which the second cause of action is predicated. Defendant does not seek arbitration under this prior agreement. Consequently, defendant, under any circumstances, is not entitled to stay proceedings in so far as plaintiff's first cause of action is concerned.

It is submitted, however, that defendant has failed to make out a proper case for arbitration, and, therefore, that it is not entitled to the inciden- 177
tal relief now sought.

WHEREFORE, deponent respectfully prays that defendant's motion for a stay be denied in all respects.

(Sworn to by A. T. Goodenough on April 10, 1933.)

178 **Answering Affidavit of Mark J. Hayes, Read in Opposition to Motion.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

179

State of New York,
County of New York,
Southern District of New York—ss.:

MARK J. HAYES, being duly sworn, deposes and says: That he is the New York sales manager for the plaintiff corporation, and was present at the conference of December 5th, 1932, referred to in the annexed affidavit of A. T. Goodenough, sworn to April 10th, 1933.

180 That deponent has read the said affidavit, and, that the statements therein contained, concerning the said conference and the conversation had thereat, are true.

(Sworn to by Mark J. Hayes on April 10, 1933.)

Opinion.

181

WOOLSEY, *J.*:

I grant the plaintiff's motion to strike out the second separate defense.

I deny the defendant's motion for a stay of the proceedings herein.

I. The plaintiff's motion originally was to strike out both the first and second affirmative defenses pleaded by the defendant. The motion to strike out the first defense, however, was withdrawn and decision is to be made on the motion to strike out the second separate defense which pleads an arbi- 182
tration agreement in the contract between the parties and the cross-motion of the defendant for a stay under that agreement.

II. The arbitration agreement reads as follows:

> "In case any dispute should arise between the buyer and the seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The buyer and the seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator. The decision 183
> of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling specific performance of this arbitration agreement in accordance with the arbitration law of the State of New York."

184 Although it is somewhat inartistically worded, I hold that this arbitration agreement between the parties is to be enforced by the New York State Courts under the New York State Arbitration Statute, Consolidated Laws, C. 72; Laws of 1920, c. 275.

An arbitration agreement having such a provision for enforcement is merely an agreement for the forum of a remedy and does not constitute a defense to an action in this Court or oust this Court from an otherwise appropriate jurisdiction. *California Prune & Apricot Growers Association* v. *Gatz American Company,* 60 F. (2d) 788, 790, 791
185 (C. C. A. 9); *The Fredensbro,* 18 F. (2d) 983, 984-985; *Lappe* v. *Wilcox,* 14 F. (2d) 861, 862, 864.

To be specifically enforcible in a particular forum an agreement for arbitration must not provide for an arbitration outside the jurisdiction of that forum or under any arbitration law other than the arbitration law of that forum. *Cf. The Beechwood,* 35 F. (2d) 41, 42-43; *The Silverbrook,* 18 F. (2d) 144, 145-146; *The Fredensbro,* 18 F. (2d) 983, 984-985. For otherwise the Court which specifically enforces the arbitration agreement would find itself without power adequately to fol-
186 low up the situation, and see that its order or decree is performed by the party against whom it is made.

III. In as much as the parties by their agreement have arranged to arbitrate disputes arising under the contract, which is the subject matter of this suit, and have contractually agreed on the forum in which that arbitration clause is to be enforced, I think that the proper procedure for me to follow is to deny the defendant's motion in this

cause for a stay pending arbitration, and to leave 187
him to the remedies of which it may be able to avail itself in the New York Supreme Court under the Arbitration Law of New York State.

The New York Arbitration Act gives specific performance of contracts to arbitrate, Consolidated Laws, c. 72, Sections 3, 4 and 5, and in arbitration proceedings in the New York State Courts against the plaintiff here, those Courts might very well, it seems to me, include an injunction or stay against its proceeding with litigation in any other forum—whether federal, state or foreign. For only thus could the New York arbitration proceeding be 188
properly protected and controlled by the New York State Courts.

Settle orders on notice.

November 24, 1933.

JOHN M. WOOLSEY,
United States District Judge.

189

Order With Notice of Entry.

190

At a Stated Term of the United States District Court for the Southern District of New York, held at the court house thereof, in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 14th day of December, 1933.

Present—Hon. John M. Woolsey, *U. S. D. J.*

191

Shanferoke Coal & Supply Corporation of Delaware,

Plaintiff,

—against—

Westchester Service Corporation,

Defendant.

The defendant above named, having duly moved for an order staying the trial of this action, and all proceedings herein until arbitration has been had,
192 in accordance with the terms of an agreement entered into by and between the parties to this action, which agreement is referred to in the second cause of action contained in the complaint, and the said motion having duly come on herein,

Now, on reading and filing defendant's notice of motion dated August 10th, 1933, the affidavit of Ernest E. Wheeler, sworn to August 10th, 1933, defendant's notice of motion dated March 25th, 1933,

and the affidavits of Gerald S. Couzens and Abraham H. Elkind, both sworn to March 24th, 1933, the exhibits thereto annexed and the complaint and answer herein, in support of defendant's said motion, and upon reading and filing the affidavits of A. T. Goodenough and Mark J. Hayes, both sworn to August 30th, 1933, the affidavit of Benjamin Lewis, sworn to September 1st, 1933, the affidavits of A. T. Goodenough and Mark J. Hayes, both sworn to April 10th, 1933, in opposition to defendant's said motion, and after hearing Ehrich, Royall, Wheeler & Walter, attorneys for defendant by Ernest E. Wheeler of counsel, in support of said motion, and Messrs. Moos, Nathan, Imbrey & Levine, attorneys for plaintiff, by Benjamin Lewis of counsel, in opposition to said motion, and due deliberation having been had thereon, and upon reading and filing the opinion of the court, it is 193 194

Now, on motion of Moos, Nathan, Imbrey & Levine, attorneys for plaintiff,

ORDERED, that defendant's motion for an order staying the trial of this action and all proceedings herein until arbitration has been had between the parties, be and the same is hereby denied in all respects. 195

WOOLSEY,
U. S. D. J.

Petition.

196

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Index No. L54—P108.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

197

Defendant.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The above-named defendant feeling itself aggrieved by the order made and entered in this cause on the 14th day of December, 1933, denying the defendant's motion for an order staying the trial in this action and all proceedings herein until

198 arbitration has been had between the parties, does hereby appeal from said order to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be submitted to the United

States Circuit Court of Appeals for the Second Circuit. 199

Dated, New York, January 10th, 1934.

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for the Defendant in Error,
Office and Post Office Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

The foregoing appeal is hereby allowed the 12th day of January, 1934. 200

ROBERT P. PATTERSON,
United States District Judge.

Filed January 15, 1934.

Assignment of Errors.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Index No. L54—P. 108.

201

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant.

Comes now the defendant Westchester Service Corporation and files the following assignment of

202 errors upon which it will rely upon its appeal from the order made by this Honorable Court on the 14th day of December, 1933, in the above-entitled cause:

(1) The Court erred in denying defendant's motion to stay the trial of this action or proceedings thereunder until an arbitration has been had in accordance with said agreement.

(2) The Court erred in ruling that the arbitration agreement between the parties is to be enforced by the New York State Courts under the New York State Arbitration Statute.

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(3) The Court erred in holding that the defendant was asking the Court to enforce specifically the arbitration agreement.

(4) The Court erred in failing or refusing to grant defendant's motion to stay the trial in this action and all proceedings thereunder until an arbitration has been had in accordance with said agreement, as required by paragraphs 2 and 3, Chapter 213, 43 U. S. Statutes 883, entitled "An Act to make valid and enforcible written provisions or agreements for arbitration of disputes arising out of con-
204 tracts, maritime transactions or commerce among the states or territories or with foreign nations."

(5) The Court erred in failing or refusing to grant defendant's motion to stay the trial in this action and all proceedings thereunder until an arbitration has been had in accordance with said agreement, as required by paragraphs 2 and 5, Chapter 72, Consolidated Laws of New York, entitled "Arbitration Law".

WHEREFORE, defendant in error prays that said 205
order of said Court may be reversed and that defendant's motion to stay the trial in this action and all proceedings thereunder until an arbitration has been had in accordance with said agreement may be granted in all respects, and in order that the foregoing assignment of errors may be part of the record, the defendant in error presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such cases provided, all of which is respectfully submitted.

206

Dated, New York, January 10th, 1934.

EHRICH, ROYALL, WHEELER
& WALTER,
Attorneys for the Defendant in Error,
Office and Post Office Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

207

Citation.

208 *By the Honorable Robert P. Patterson, One of the United States District Judges for the Southern District of New York in the Second Circuit, to Shanferoke Coal & Supply Corporation of Delaware*, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, County of New York, at the District and Circuit above named, on the 10th day of February, 1934, pursuant to an appeal filed in the Clerk's office for the District Court
209 of the United States for the Southern District of New York, wherein Westchester Service Corporation is appellant and you are appellee, to show cause if any there be why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in their behalf.

GIVEN under my hand at the Borough of Manhattan, City of New York in the District and Circuit above named this 12th day of January, in the year of our Lord One Thousand Nine Hundred
210 and Thirty-four, and of the independence of the United States the One Hundred and Fifty Eighth.

ROBERT P. PATTERSON,
United States Judge for the Southern District of New York in the Second Circuit.

Stipulation as to Record.

211

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, February 6, 1934.

MOOS, NATHAN, IMBREY & LEVINE,
Attorneys for Appellee.

EHRICH, ROYALL, WHEELER & WALTER,
Attorneys for Appellant.

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Clerk's Certificate.

214

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

215

United States of America,
Southern District of New York—ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

216 IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District, this 7th day of February, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the said United States the one hundred and fifty-eighth.

CHARLES WEISER,
Clerk.

(Seal)

Opinion by L. Hand, *C. J.*

217

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 370—OCTOBER TERM, 1933.

Argued March 31, 1934. Decided April 16, 1934.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Plaintiff-Appellee,

—against— 218

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before—L. HAND, SWAN and AUGUSTUS N. HAND, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York denying a motion to stay an action at law, pending arbitration. 219

ERNEST E. WHEELER, of New York City, for appellant.

BENJAMIN LEWIS, of New York City, for appellee.

L. HAND, Circuit Judge.

The plaintiff, a citizen of Delaware, sued the defendant, a citizen of New York, in the District

220 Court, alleging that the plaintiff was the sole selling agent for the Hudson Coal Company; and that in January, 1931, the defendant promised to buy, and the plaintiff to sell, 75,000 tons of Hudson Company coal spread over five years "in as nearly equal monthly installments as practicable". That since December 1, 1931, the defendant had refused to order 1,250 tons a month, had taken in all up to March 1, 1933, only 16,173 tons, had notified the plaintiff that it would not "order, accept or pay for coal as provided in the agreement", and had thereby repudiated it. That there remained for delivery 52,309 tons, the commissions
221 upon the sale of which the plaintiff had lost and now claimed in the action. The defendant answered, denying a number of the allegations and setting up as a defense a clause in the contract which provided for arbitration "in case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement. * * * In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this
222 arbitration agreement in accordance with the arbitration laws of the State of New York." Thereupon the defendant moved to stay the action under Section 3 of the United States Arbitration Act, Title 9, §3, U. S. Code (9 U. S. C. A. §3). In its affidavits it alleged that it had always been willing to arbitrate the dispute but that the plaintiff had refused to accept an order for coal, and had without cause declared the contract at an end. The plaintiff in its answering affidavits alleged that it had repeatedly tried to compel the defendant

to live up to the contract, but that it had refused 223
on the ground that it could get cheaper coal elsewhere. That the plaintiff had been willing to accept the last order on condition that its acceptance should not affect its rights, but the defendant was unwilling to agree to this, demanding a reduction in the price; that therefore there was no genuine dispute between the parties and nothing to arbitrate. The judge denied the motion; he thought that the arbitration clause confined the parties to an arbitration in the Supreme Court of New York, and that a stay would involve superintendence over such a proceeding, which the Dis- 224
trict Court was unfitted to undertake.

We do not find it necessary to decide whether the arbitration clause at bar was limited to a proceeding in the state court. While it is certainly possible to read the language only as an addition, redundant because already provided by law, and as not intended to prevent arbitration elsewhere, we are content to treat it as exclusive, as the judge did. The District Court could not in that event enforce the clause specifically. *California Prune & Apricot Growers' Association* v. *Catz American Co.*, 60 F. (2d) 788, 85 A. L. R. 1117 (C. C. A. 9). Without the United States 225
Arbitration Act we may assume that it could not even stay the action until arbitration was had in the state court. *The Atlanten*, 252 U. S. 313, 40 S. Ct. 332, 64 L. Ed. 586; though *Pacific Indemnity Co.* v. *Insurance Co. of North America*, 25 F. (2d) 930 (C. C. A. 9), may be read to the contrary. However, Section 3 now specifically provides for a stay, and we have only to decide whether it covers the situation; that is, whether the arbitration must be in a federal court. The

226 decisions in the District Courts are divided. *The Silverbrook* (D. C.), 18 F. (2d) 144, *The Fredensbro* (D. C.), 18 F. (2d) 983, and *The Beechwood* (D. C.), 35 F. (2d) 41, take the view of the Judge below; *Danielsen* v. *Entre Rios Rys. Co.* (D. C.), 22 F. (2d) 326, and *The Volsinio* (D. C.), 32 F. (2d) 357 (semble), are *contra*. So too is *In re Inter-Ocean Food Products, Inc.* v. *York Mercantile Co.*, 206 App. Div. 426, 201 N. Y. S. 536. Under a very similar act in England, it is established law that an agreement to submit to a foreign court justifies the stay of an action brought on the contract elsewhere. *Law* v. *Garrett*, L. R. 227 8 Ch. Div. 26 (C. A.); *Austrian, etc., Co.* v. *Gresham, etc., Society*, L. R. (1903) 1 K. B. 249; *Kirchner* v. *Graban* (1909), 1 Ch. Div. 413; *The Cap Blanco* (1913), Pr. Div. 130. *California Prune & Apricot Growers' Association* v. *Catz American Co., supra* (60 F. (2d) 788, 85 A. L. R. 1117), merely decided, as we have said, that a federal District Court would not specifically enforce an arbitration clause under a local state statute. In *Lappe* v. *Wilcox* (D. C.), 14 F. (2d) 861, a stay was denied under the New York act (Consol. Laws, c. 72), in the case of a contract 228 made before the federal act was passed. We can see no reason for a limited construction, and conclude that Section 3 authorizes a stay even though the arbitration must take place beyond the jurisdiction of the court. In *The Volsinio, supra* (D. C.), 32 F. (2d) 357, the actual ruling was that although this was true, the section was inapplicable, unless the contract was itself "maritime", or "involved commerce", as defined by Section 1 of the Act (9 U. S. C. A. §1). We are not clear that this is true; Section 2 defines those contracts

which it makes "valid, irrevocable and enforce- 229
able", and no doubt such alone are within Section 4. *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons*, 62 F. (2d) 1004 (C. C. A. 2). But it does not follow that Section 3 is so circumscribed; the language is: "If any suit * * * be brought * * * upon any issue referable to arbitration under an agreement * * * for such arbitration." "Such arbitration" may very well refer back to "any issue referable to arbitration", and not to Section 2. The change in language from Section 5 of the New York Arbitration Act, for which, in general, Section 3 of the federal act was copied, was plainly deliberate. In the New York act the 230
clause had read, "under a contract * * * described in section two", and Section 2 of that act was the analogue of Section 2 of the federal act (9 U. S. C. A. §2). "Such arbitration" was very awkward as an equivalent for all that is comprised in Section 2 of the federal act, and suggests a broader intent. It is not necessary, however, to decide the point here, because the contract "involved commerce" as defined by Section 1. The seller, the plaintiff, was to ship the coal on cars f. o. b. Pennsylvania, consigned at the buyer's directions, and, since the buyer's place of 231
business was Yonkers, the "commerce" concerned was between the states.

Again, we scarcely think sufficient the objection, which the judge thought vital; that is, that a stay may involve some supervision over the arbitration. This was raised only to be overruled in *Law* v. *Garrett*, *supra*, L. R. 8 Ch. Div. 26, with which we agree. The defendant's right to a stay presupposes his freedom from "default" at the outset, and perhaps also that he shall never default

232 in performance. Thus it may from time to time be necessary for the court where the action is pending to consider how far he has continued to perform. Even so, the superintendence involved is not beyond the compass of a court of equity; it does not require detailed supervision, like the building of a house, or the manufacture of some especial machine, which is likely to demand repeated recourse to the court.

The plaintiff further objects that the defendant is "in default in proceeding with such arbitration", within the meaning of Section 3. True, it has not named its arbitrator, but in its answer
233 and moving affidavits has merely expressed its willingness to submit to arbitration. This appears to us enough. It was the plaintiff who declared the contract to be at an end; and with that the defendant was contented. If the plaintiff meant to proceed further and enforce a claim for damages, the initiative rested upon it; it should have named the first arbitrator. If it did not but sued instead, it was itself the party who fell "in default in proceeding with such arbitration", not the defendant. Under the English act, which is more stringent, a mere affidavit of will-
234 ingness is enough. *Piercy* v. *Young*, L. R. 14 Ch. D. 200, 209. Nor are we impressed with the notion that there was nothing to arbitrate. We may assume arguendo, though we do not mean so to decide, that if a party repudiates a contract in toto, he can neither insist on arbitration, nor compel the opposite side to do so. *Jureidini* v. *National British Millers Ins. Co.* (1915), A. C. 499; *Aktieselskabet* v. *Rederiaktiebolaget Atlanten* (D. C.), 232 F. 403. Here, though the defendant failed to perform, that was not a repudiation, and the

arbitration clause was for the very purpose of ad- 235
justing breaches. We need not say that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration clause (*In re Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 199, 146 N. E. 203); but the plaintiff's own right to repudiate was not so clear as that. We must take the defendant's version on the issue; it says that in December, 1932, it ordered 390 tons of coal, and that the plaintiff accepted the orders and filled them. That in January it again ordered 250 tons more, which the plaintiff refused to de- 236
liver except on condition that its rights should remain unaffected. That the defendant agreed to this, but changed its mind later and cancelled the contract. If all this be true, it is apparent that the plaintiff's right to call off the whole contract and sue for damages was open to debate. *Landes* v. *Kloptock*, 252 F. 89 (C. C. A. 2); Restatement of Contracts, § 317 (2); Comment on Subsection (2); Illustration 7. There was therefore something to arbitrate quite aside from the liquidation of damages. Indeed this alone would be enough, if the merits were otherwise conceded. It is true that the complaint asks for commissions 237
and the plaintiff insists that the liquidation of these requires only an arithmetical computation; but the contract reads as a straight sale, and again it is at least debatable how damages shall be calculated. It is quite true that before any of the modern statutes, provisions in contracts for the arbitration of incidental issues were treated as valid and as conditions precedent. At times it has been thought that the statutes do not cover such arbitrations (*In re American Insurance Co.*,

238 208 App. Div. 168, 203 N. Y. S. 206); though the question is perhaps open in New York (*In re 176 and 178 E. Main Street*, 238 App. Div. 248, 264 N. Y. S. 717). But even if this be true, a clause of general arbitration does not cease to be within the statute when the dispute narrows down to damages alone. *General Footwear Co.* v. *A. C. Lawrence Leather Co.*, 252 N. Y. 577, 170 N. E. 149; *Marchant* v. *Mead-Morrison Co.*, 252 N. Y. 284, 298, 299, 169 N. E. 386. If the clause is general in form, it makes no difference what may come up under it.

239 The stay should be granted, but the District Court will be free without the leave of this court to vacate it at any time, should it appear that the defendant is in default in proceeding with the arbitration.

Order reversed; cause remanded.

240

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS, 241

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 23rd day of April, one thousand nine hundred and thirty-four.

Present—HON. LEARNED HAND, 242
HON. THOMAS W. SWAN,
HON. AUGUSTUS N. HAND,
Circuit Judges.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,
Plaintiff-Appellee,

vs.

WESTCHESTER SERVICE CORPORATION,
Defendant-Appellant.

243

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed

244 with costs, and cause remanded with instructions to enter an order in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

WM. PARKIN,
Clerk.

(Endorsed)

245 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE

—against—

WESTCHESTER SERVICE CORPORATION.

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246 ORDER FOR MANDATE.

United States Circuit Court of Appeals—Second Circuit—

Filed April 23, 1934.

William Parkin, Clerk.

Clerk's Certificate.

247

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 76, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

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Plaintiff-Appellee,

—against—

WESTCHESTER SERVICE CORPORATION,

Defendant-Appellant.

as the same remains of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day 249 of July, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

WM. PARKIN,

(Seal)

Clerk.

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

No. 211

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

GEORGE C. LEVIN,
Counsel for Petitioner.

ALFRED B. NATHAN,
LOUIS H. MOSS,
BENJAMIN LEVIN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

No. .

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,
Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,
Respondent.

Petition.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Shanferoke Coal & Supply Corporation of Delaware, respectfully shows to the Court as follows:

This is an application for a writ of certiorari in order to review an order of the Circuit Court of Appeals, Second Circuit, which reversed an order of the District Court for the Southern District of New York, denying respondent's motion for a stay of all proceedings pending arbitration. The order of the Circuit Court granted respondent's said motion, with leave to the District Court to vacate the said order at any time, should it appear that respondent was in default in proceeding with the arbitration.

A.

Statement of Facts.

The complaint contains two causes of action. The first sought to recover damages for defendant's breach and repudiation of a contract for the sale and delivery of coal, entered into by it with The Hudson Coal Co., plaintiff claiming to be the beneficiary designated by the contracting parties to receive the benefits of the said contract (R. 4-7). This cause of action was not involved on defendant's motion for a stay.

The second cause of action seeks to recover damages for defendant's breach and repudiation of a contract entered into by it directly with plaintiff. By the terms of the said contract, defendant agreed to purchase 75,000 gross tons of anthracite coal, of certain specified sizes, in a period of not less than three nor more than five years, from plaintiff. The said contract further provided that defendant would order and accept delivery of said coal, during such period, in as equal monthly installments as practicable, it being agreed between the parties that delivery of said coal by plaintiff and its acceptance by defendant should extend over said period of not less than three nor over five years in as even a manner as practicable (R. 8).

It is then alleged that, by the terms of said agreement, defendant was obligated to order and accept from plaintiff, on the average, at least 1250 gross tons of coal per month. The second cause alleges further that defendant, since December 1st, 1931, without just cause, neglected and refused to order, accept or pay for at least an average 1250 gross tons of coal per month, as required by said agreement, but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has failed to order or accept any coal whatso-

ever from plaintiff; that defendant was in default, under its said agreement, to the extent of approximately 16,173 gross tons of coal, and that prior to the commencement of this action, defendant notified plaintiff it would not order, accept or pay for coal as provided in its said agreement, and that defendant repudiated the same (R. 8-9).

It is then pleaded that plaintiff, at all times mentioned, was ready, able and willing to perform the said agreement, with respect to furnishing, selling and delivering coal as required by the agreement, and, would have furnished, sold and delivered the same, but for defendant's said neglect, refusal and repudiation. It is alleged further that there remains to be delivered to defendant, under said agreement, in all, a balance of 52,309 gross tons of coal (R. 9).

The complaint then alleges that plaintiff, as defendant well knew, was entitled to and received commissions, by virtue of an agreement which it had with The Hudson Coal Co., upon all coal sold and delivered by plaintiff to defendant, under its agreement between the latter. Accordingly, plaintiff seeks to recover, under its second cause of action, as damages for defendant's breach and repudiation, commission in the sum of $9,851.74, which it claims it would have earned if defendant had fully performed the terms and conditions of said agreement (R. 9-10).

Defendant, after service of the complaint, made a motion addressed to the sufficiency of the first cause of action, requesting a dismissal thereof upon the ground that it failed to set forth facts sufficient to constitute a cause of action (R. 17). The District Court granted this motion, holding that plaintiff was merely an incidental beneficiary, and as such, could not sue on the contract entered into between defendant and The Hudson Coal Co. An appeal was taken by plaintiff from the order and judgment dismissing its said first cause of action, to the Circuit Court of Appeals, Second Circuit. That Court affirmed the said

order and judgment, without opinion. Thereafter, plaintiff applied to this Court for a writ of certiorari, in order to review the said determination of the Circuit Court. The said petition, it is expected, will be considered at the October Term of this Court.

Simultaneously with its motion to dismiss the first cause of action, and before answering, defendant moved for an order staying all proceedings under the second cause of action, pending arbitration. The said application was predicated upon a clause in the contract between plaintiff and defendant, which provided for arbitration. The District Court denied this motion, without prejudice to a renewal thereof, on the ground that it was premature and could not be entertained until issue had been joined by the service of an answer (R. 17-18).

Defendant served its answer on July 27th, 1933, and thereafter renewed its motion for a stay pending arbitration, upon the pleadings and upon the affidavits and papers submitted upon its former motion, and upon an affidavit setting forth the proceedings already had. This motion came on to be heard simultaneously with a motion by plaintiff to strike out defendant's second separate defense which pleaded the arbitration agreement (R. 18).

Defendant's motion was denied by the District Court, which rendered an opinion that appears in the record submitted herewith. Defendant thereupon appealed to the Circuit Court of Appeals, Second Circuit, from the order denying its said application. That Court reversed the said order and granted the defendant's motion, rendering an opinion which is reported in 70 F. (2nd) 297, and at page 73 of the record.

It is claimed in defendant's moving affidavits that a dispute arose between plaintiff and defendant as to the performance of the agreement. In this connection, defendant asserts that, subsequent to the execution of the agreement, it ordered the shipment of coal, from time to time,

and that plaintiff complied with such orders, to and including the month of December, 1932 (R. 22).

It is stated further in defendant's affidavits that, on January 3rd, 1933, defendant placed an order for the shipment of seven cars of coal; that thereafter defendant received a letter from plaintiff charging defendant with being in default in the placing of orders under the existing contracts and refusing to accept the order in question, unless defendant conceded that the acceptance of same was without prejudice to plaintiff's rights (R. 22-23, 35-36).

It is asserted further in the said affidavits that defendant's vice-president, Mr. Elkind, conversed with plaintiff's President, Mr. Goodenough, with reference to the said letter received from plaintiff, and urged that defendant was not in default under its contracts. It was claimed that Mr. Goodenough agreed that he saw no reason why his company should not fill the order for the seven cars of coal and that it would do so (R. 23).

Defendant then states that a letter was received from plaintiff's attorneys, finally declining to ship the coal in compliance with defendant's order. It is claimed that, after the receipt by defendant of the said letter, its president, Mr. Couzens, conversed with Mr. Goodenough, again urged that defendant's aforesaid order be accepted. It is claimed, also, that, prior to the giving of said order, Mr. Couzens had some discussion with plaintiff's officers and that no claim was made on the part of plaintiff, prior to January 5th, 1933, that defendant was in default in purchasing coal under its agreement with plaintiff (R. 23-24).

It is then asserted that defendant has always stood ready and willing to arbitrate its dispute with plaintiff, in accordance with the contract provisions, and still is ready and willing to comply with all of the terms of the contract, and to order and accept, within the contract term, the amount of coal required to be ordered (R. 24).

The contract provisions relating to the arbitration of disputes between the parties, reads as follows:

> "In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. *In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York*" (R. 31). (Italics ours.)

The answering affidavits interposed by plaintiff, disclose the lack of merit in defendant's application. Thus, it is shown that, at the time the present action was instituted, in March, 1933, defendant was in default to the extent of approximately 16,173 gross tons of coal, even on the basis of a five year term. Defendant's delinquency first occurred in December, 1931 (R. 41).

The default continued until the spring of 1932, when plaintiff's president, Mr. Goodenough, communicated with defendant's vice-president, Mr. Elkind, and called latter's attention to the fact that defendant was far behind its quota. Mr. Elkind admitted his company had not been ordering and purchasing coal in the quantities required by its contract, but explained that defendant's failure to do so was due to business conditions, promising that defendant would make up its arrears in the fall, when conditions were expected to improve (R. 42).

Defendant, however, continued in default. In September, 1932, Mr. Goodenough again communicated with Mr. Elkind and called the latter's attention to the situation, pointing out that defendant was in arrears. Further assurances were given that defendant would make up its arrears shortly. These promises, however, were not fulfilled. Consequently, in December, 1932, Mr. Goodenough arranged a conference with Mr. Elkind, at the latter's office, for the purpose of discussing the situation, with a view towards having defendant meet its arrears, in accordance with the promises and assurances theretofore given (R. 42).

The conference was held on December 5th, 1932. Mr. Goodenough and Mr. Hayes, plaintiff's New York sales manager, were present as the latter's representatives. Mr. Elkind and Mr. Couzens represented defendant. Mr. Goodenough pointed out that defendant was far behind its quota and requested that immediate arrangements be made, in accordance with the assurances theretofore given, to eliminate the arrears (R. 42-43).

Then, for the first time, the true reason for defendant's default and its failure to comply with its contract, were disclosed. *Mr. Elkind stated that the true reason for defendant's continued failure to purchase coal from plaintiff in compliance with the contract, was due to the fact that defendant could obtain coal from other sources at prices lower than those required to be paid by the terms of the contract. Mr. Elkind stated further that, unless plaintiff modified the existing contract, by reducing the prices of its coal, defendant would not order or purchase any coal from plaintiff* (R. 43).

Despite Mr. Goodenough's attempt to persuade Mr. Elkind that defendant should abide by its agreement, Mr. Elkind refused to change his position, and, asserted that defendant would not purchase any coal from plaintiff unless the prices required to be paid under said agreement,

were reduced. After conferring with his associates, Mr. Goodenough found that such arrangement could not be made, and, finally so advised Mr. Elkind (R. 43).

It is clear that *defendant* intentionally defaulted and then deliberately repudiated its contract, when it could not bludgeon plaintiff into meeting its unwarranted and unjustified demand for a price reduction. In this regard, it should be noted that the facts concerning defendant's breach and repudiation of the contract as set forth in plaintiff's answering affidavits, have never been denied by defendant, although the latter had ample opportunity to do so. Thus, when defendant renewed its motion for a stay, it was fully familiar with plaintiff's contentions regarding defendant's default and repudiation. Upon the argument of defendant's first motion for a stay, in April, 1933, plaintiff's counsel delivered to defendant's attorney, copies of plaintiff's answering affidavits, which were substantially similar in content to the answering affidavits submitted by plaintiff upon the renewal of defendant's application (R. 50).

Defendant's failure to take issue with plaintiff's version of the default and repudiation of the agreement, either on its first motion, or, when it renewed its application, must be deemed an admission of the truth of plaintiff's charges. Under these circumstances, it is evident that there is no bona fide dispute concerning the performance of the contract, which is referable to the arbitration.

On January 3rd, 1933, when defendant placed its order for a small quantity of coal, it was substantially in default under its contract. Plaintiff, however, was willing to fill this order, on condition that its acceptance thereof be without prejudice to its rights under the contract. Since defendant refused to accede to this reasonable request, the shipment could not be made (R. 43).

The assertion in the affidavit submitted by Mr. Elkind in support of defendant's application for a stay, to the effect that he advised Mr. Goodenough that defendant was

not in default and urged that the question of any existing default be settled in a proper manner, is denied by the latter, who alleges that Mr. Elkind merely stated his concern would not acquiesce in plaintiff's suggestion that the shipment of coal be made without prejudice. In this regard, Mr. Elkind stated, according to Mr. Goodenough, that plaintiff could either ship the coal or cancel the order. Mr. Goodenough, as appears from his affidavit, thereupon informed Mr. Elkind that plaintiff could not make the shipment, unless it be accepted without prejudice to plaintiff's rights (R. 44). A letter confirming this position was sent to defendant by plaintiff's counsel (R. 37-38).

Defendant's moving papers are noteworthy for a significant omission. Nowhere in the moving affidavits, does there appear any unequivocal assertion that defendant is not in default under its contract. Manifestly, defendant could not truthfully make such assertion, since the undisputed facts show clearly that it was in default to the extent of approximately 16,173 gross tons of coal, when the present action was commenced (R. 41), and that it had repudiated its contract with plaintiff, taking the unjustifiable position that it would not perform its agreement, unless plaintiff complied with defendant's unwarranted and unjustified demand for a price reduction (R. 43).

In opposing defendant's application for a stay, plaintiff seasonably urged the objection that a stay should not be granted because there was no arbitrable dispute or controversy between the parties (R. 45-46). Plaintiff urged, also, the jurisdictional objection that any application, either to compel arbitration, or to obtain a stay, could be made only in the Supreme Court of the State of New York, in view of the express provisions in the contract requiring arbitration to be had in accordance with the statute of that State (R. 46).

Finally, plaintiff pointed out that defendant was not acting in good faith and that it was guilty of laches which

barred it from obtaining either arbitration, or a stay pending arbitration (R. 51-52).

B.

The Issues.

The primary issue to be determined is whether a federal court is empowered to grant a stay pending arbitration, under a contract which limits the parties, in the event arbitration is desired, to a foreign forum, and requires the arbitration to proceed under the arbitration law of such forum.

This issue necessarily involves the question whether the granting of a stay, under such contract, by a federal court, would not require a degree of superintendence beyond the court's compass.

The issue is then presented whether a mere expression of willingness to arbitrate, is sufficient to establish that the party seeking the stay, is not in default in proceeding with arbitration. This issue necessarily raises the question whether the plaintiff, if it intended to proceed to enforce its alleged claim for damages, was required, in the first instance, to initiate arbitration by naming the first arbitrator. This question involves the issue whether, in failing to name the first arbitrator, and in commencing the present action, the plaintiff was itself the party who fell in default in proceeding with arbitration.

In addition to the foregoing, there is also presented the issue whether, upon defendant's breach and repudiation of the contract, there remained any matters referable to arbitration. This issue necessarily involves the question whether the mere assessment of plaintiff's damage, would constitute an arbitrable issue.

The petitioner contends that a District Court is not

empowered to compel arbitration, or grant a stay pending arbitration, where such relief is sought, as in the instant case, under the provisions of a contract limiting the parties to arbitration in a foreign forum, and under the law of such forum. Petitioner contends that, under the circumstances present in the instant case, the granting of a stay, pending arbitration, constitutes an indirect method of compelling arbitration, which the federal court is without power to do. It is the petitioner's contention that the granting of a stay, under the circumstances present, would require a degree of superintendence beyond the compass of the federal court.

In any event, petitioner contends that, upon the facts disclosed by the record, the defendant must be deemed to have waived and abandoned any rights which it possessed under the arbitration clause, by reason of its unreasonable delay and laches. Finally, petitioner contends that no arbitrable dispute exists between the parties, and, therefore, that neither arbitration, nor a stay pending arbitration, may be granted.

C.

Reasons For Allowance of Writ.

I.

The ruling of the Circuit Court that a federal court may issue a stay pending arbitration, under a contract which requires the parties to arbitrate in a foreign forum under the law of such forum, is contrary to the great weight of authority (*The Silverbrook,* 18 Fed. [2d] 144; *The Beechwood,* 35 Fed. [2d] 41; *Gilbert* v. *Burnstein,* 255 N. Y. 348, 354).

II.

In ruling upon the right of the federal court to issue a stay pending arbitration, under the circumstances adverted to, the court below has decided an important question of federal law, which has not been, but should be settled by this Court. There is a diversity of opinion among the various district courts, upon the right of a federal court to grant a stay pending arbitration under circumstances, such as are present in the case at bar, as the court below pointed out in its opinion (70 F. [2d] 297, 298). Thus, *The Silverbrook, supra, The Fredensbro,* 18 F. [2d], 983, and *The Beechwood, supra,* hold that a federal court may not grant a stay under such circumstances, whereas, *Danielsen* v. *Entre Rios Rys. Co.,* 22 F. [2d] 326 and *The Volsinio,* 32 F. [2d] 357, take a contrary view. There is a conflict also between the federal decisions and those in the state courts. Thus, *Gilbert* v. *Burnstein,* 255 N. Y. 348, 354, is opposed to the decisions last cited.

This diversity and conflict of opinion, which was recognized by the court below, makes it desirable that a final and determinative adjudication be made by this Court upon the issue involved.

III.

The decision of the Circuit Court of Appeals also is contrary to the great weight of authority to the effect that upon defendant's breach and repudiation of its contract, plaintiff, as the injured party, had the right to institute suit immediately to recover the commissions which it had thus been prevented from earning (*Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 589; *Rohem* v. *Horst,* 178 U. S. 1, 20; *Henderson etc.* v. *Wilson & Co.,* 235 N. Y. 489, 499; *Plunkett* v. *Comestock Cheney Co.,* 211 App. Div. 737, 741; *Lace Selling Co.* v. *Shapiro,* 249 N. Y. 68, 72), and, to the effect that, under the circumstances, neither

arbitration nor a stay pending arbitration could be granted, since no genuine arbitrable dispute existed between the parties (*Matter of Wenger,* 39 N. Y. 199, 202; Sec. 2, U. S. Arbitration Act).

IV.

The decision of the Circuit Court of Appeals is contrary to the great weight of authority to the effect that a mere assessment of damage does not constitute an arbitrable dispute (*Toledo S. S. Co.* v. *Zenith Transportation Co.,* 184 Fed. 391, 401; *Matter of American Ins. Co.,* 208 App. Div. 168, 170, 171; *Williams* v. *Ins. Co.,* 118 Misc. 799, 801; *Matter of Fletcher,* 237 N. Y. 440, 447; *Matter of Webster* v. *Van Allen,* 217 App. Div. 219; *Grody* v. *Silverman,* 222 App. Div. 526, 527.

V.

The decision of the Circuit Court of Appeals is contrary to the great weight of authority to the effect that a party who is guilty of delay and laches may not compel arbitration or obtain a stay pending arbitration (*Matter of Zimmerman* v. *Cohen,* 236 N. Y. 15, 21; *Nagy* v. *Arcas Brass & Iron Co.,* 242 N. Y. 97, 99; *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, affd. 186 N. Y. 611; Sec. 3 U. S. Arbitration Act).

VI.

The Circuit Court of Appeals has decided several important questions of general law relating to arbitration in a manner contrary to the great weight of authority, and has so far departed from the weight of judicial authority as to call for an exercise of this Court's power of supervision. Business men are resorting with increasing frequency to arbitration agreements. The interpretation and enforcement of such agreements has become a fertile field for

litigation. Manifestly, it is of the greatest importance to eliminate the diversity and conflict of decisions in the courts below by enunciating a definite rule of law, which will serve as a guide and standard. The importance and novelty of the issues and the conflict in the lower courts, constitutes this a proper case for consideration by this Court. In the interests of justice, therefore, the decision of the court below should be reviewed by this Court.

Your petitioner annexes hereto its brief in support of its petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court on a day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the said order and determination of the said Circuit Court of Appeals in this cause and every part thereof, be reversed, and that the petitioner be granted such other and further relief as this Court may deem just and proper in the premises.

Dated, New York, July 20th, 1934.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

By GEORGE C. LEVIN,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

GEORGE C. LEVIN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

No. .

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,
Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The Circuit Court of Appeals for the Second Circuit granted defendant's motion for a stay pending arbitration, reversing the order of the District Court for the Southern District of New York, with an opinion which is reported in 70 F. (2d) 297, and which appears at page 73 of the record.

The District Court rendered an opinion, which is not officially reported. This opinion is printed in the record (R. 60).

II.

Jurisdiction.

1.

The jurisdiction of this Court is based upon Judicial Code, Sec. 240, as amended by the act of February 13th, 1925 (28 U. S. C. A. 347).

2.

The order of the Circuit Court of Appeals for the Second Circuit was entered on the 23rd day of April, 1934.

3.

The jurisdiction in the District Court was based on the diversity of citizenship.

III.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition of certiorari; and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument, which follows:

IV.

Specification of Errors.

It is submitted that the court below erred:

1. In holding that section 3 of the United States Arbitration Act (9 U. S. C. A. 3) authorizes a stay pending arbitration, even though such arbitration must take place beyond the jurisdiction of the federal court and under the law of a different forum.

2. In holding that a stay pending arbitration under the circumstances adverted to, does not involve and require a degree of superintendence by the federal court, which is beyond its compass.

3. In holding that the defendant was not in default in proceeding with arbitration.

4. In holding that a mere expression of willingness to arbitrate, by the defendant, was sufficient to establish that defendant was not in default in proceeding with arbitration.

5. In holding that it was plaintiff who declared the contract between the parties to be at an end.

6. In holding that, if plaintiff meant to proceed further and enforce its claim for damages, the initiative rested on it and that plaintiff should have named the first arbitrator.

7. In holding that in failing to name the first arbitrator and in bringing suit, plaintiff was itself the party who fell in default in proceeding with arbitration.

8. In holding that plaintiff repudiated its contract with defendant.

9. In holding that defendant did not repudiate its contract with plaintiff.

10. In holding that defendant's breach and repudiation of its contract with plaintiff, presented an arbitrable issue.

11. In holding that the assessment of plaintiff's damages, constituted an arbitrable issue.

Argument.

POINT A.

The Circuit Court of Appeals erred in reversing the order which denied defendant's motion for a stay pending arbitration. Since the express provisions of the contract limit the parties, in the event arbitration is desired, to an application to the New York Supreme Court for an order compelling arbitration, in accordance with the Arbitration Law of New York, the Federal Court is not the proper forum to grant either a stay pending arbitration or to compel arbitration.

1.

After pointing out that the decisions in the district courts are in conflict upon the proposition (R. 76), the court below ruled that an agreement to submit to arbitration in a foreign court, justifies a stay of an action brought on the contract elsewhere, resting its conclusion upon the authority of several decisions by the English courts. In reaching this conclusion, we believe the court below erred.

We submit that the view taken by the District Court, is the correct one. That court, in denying defendant's motion for a stay, said:

> "To be specifically enforcible in a particular forum an agreement for arbitration must not provide for an arbitration outside the jurisdiction of that forum or under any arbitration law other than the arbitration law of that forum. *Cf. The Beechwood,* 35 F. (2d) 41, 42-43; *The Silverbrook,* 18 F. (2d) 144, 145-146; *The Fredensbro,* 18 F. (2d) 983, 984-985. For otherwise the Court which specifically enforces the arbitration agreement would find itself

without power adequately to follow up the situation, and see that its order or decree is performed by the party against whom it is made.

Inasmuch as the parties by their agreement have arranged to arbitrate the disputes arising under the contract, which is the subject matter of this suit, and have contractually agreed on the forum in which that arbitration clause is to be enforced, I think that the proper procedure for me to follow is to deny the defendant's motion in this cause for a stay pending arbitration, and to leave it to the remedies of which it may be able to avail itself in the New York Supreme Court under the Arbitration Law of New York State" (R. 62-63).

The arbitration clause involved in the case at bar expressly provides that, in the event arbitration is desired, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of the arbitration clause, in accordance with the Arbitration Law of the State of New York (R. 31). By reason of this provision, it is evident that the parties have limited the forum to which application may be made, and the law which shall govern. Clearly, since the parties designated the particular forum to which application to compel arbitration should be made, and the law under which such arbitration should proceed, it cannot now be urged that arbitration, *or relief incidental thereto,* may be sought in some other forum and under some other law than that agreed upon by the parties.

To sustain such contention would require rewriting the contract and making a new agreement for the parties. The plain intent of the parties, however, may not be disregarded and the court may not make a new contract, under the guise of constructing or interpreting the agreement (*Magna Fire Ins. Co.* v. *Pospisil,* 52 F. [2d] 709, 711; *Kearns-*

Gorsuch Bottle Co. v. *Hartford-Fairmont Co.*, 1 F. [2d] 318, 319; *Schoonmaker* v. *Hoyt*, 148 N. Y. 425, 431).

The parties to a contract must abide by the terms thereof, and the mere fact that one of them subsequently deems his bargain a bad one, or disadvantageous, does not justify the court in permitting a repudiation of the unsatisfactory terms, nor does it warrant the court in making a new agreement by a process of construction or implication (*Rosenthal* v. *American Bonding Co.*, 207 N. Y. 162, 168-169; *Lockwood* v. *Embalmers Supply Co.*, 233 App. Div. 189, 194).

In view of the principles enunciated by the foregoing authorities, it is clear that the express provisions of the arbitration clause may not be disregarded. By the terms thereof the parties have definitely fixed the Supreme Court of the State of New York as the forum for arbitration, and the Arbitration Act of that State, as the law under which arbitration shall proceed. Their agreement is binding and should not be disregarded either by the parties or by the court.

In *Gilbert* v. *Burnstine*, 255 N. Y. 348, 354, the court said:

> "*Defendants' agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced. Otherwise the inference must be drawn that they never intended to abide by their pledge.* They contracted that the machinery by which their arbitration might proceed would be foreign machinery operating from the foreign court. No other fair conclusion can be drawn from their language. Their contract constitutes something more than a simple executory one subject to breach. Not only under the foreign statute but also under our own arbitration law, it has

become irrevocable in the sense that one of the parties without the consent of the other cannot deprive it of its enforcibility.

* * * * * * *

Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought." (Italics ours.)

The *Gilbert* case is not distinguishable in principle from the case at bar. In both cases, the parties expressly fixed the forum and the law under which arbitration should be had. In the instant case, the arbitration clause provides that, in the event arbitration is to be had, it shall be upon application to the State court and in accordance with the State Act. It would be difficult to make the language more emphatic or clearer. Applying the maxim *expressio unius est exclusio alterius,* it follows that any other forum or law than those specified, must be excluded.

The Federal Arbitration Act applies to only such arbitration agreements as can be performed under the supervision of the United States Courts. Thus, in *The Silverbrook,* 18 F. (2d) 144, 146, the court said:

"It is plain enough that Congress intended to abolish the old rule, established in the jurisprudence, by which the federal courts refused to enforce arbitration agreements. But, however, the act seems to contemplate only such arbitration agreements as would be or could be carried out in the United States, within the jurisdiction of and *under the control and orders of the United States courts* * * *." (Italics ours.)

And at page 147, the court concluded as follows:

"* * * this court is without jurisdiction to direct the parties to proceed to arbitration as required by

> the concluding clause of that section, because the place and manner of arbitration prescribed by the terms of the contract, are beyond the jurisdiction of this court, since the hearings and proceedings thereunder cannot be held conformable to the terms of this statute * * *."

See also:

The Beechwood, 35 F. (2d) 41, 42-43.

In *The Beechwood* case, *supra,* the court pointed that, under well settled rules, the general language of the Federal Arbitration Act must be deemed limited in application, so as not to embrace arbitrations beyond the court's jurisdiction. Clearly, it is a *sina qua non* of obtaining a stay pending arbitration from the federal court, that the arbitration agreement provide for arbitration within the jurisdiction of and under the control and order of such court. Where, as in the instant case, arbitration is to be had in another forum, it is beyond the power of the federal court, either on common law principles or under the Federal Arbitration Act, to grant a stay of proceedings pending arbitration.

2.

It was suggested by defendant in the lower courts that, as the contract in question was made in New York, and was to be performed partly in that State, the contracting parties had in mind the benefits of the New York Statute, but in no way intended to exclude any other forum or the Arbitration Act of any other jurisdiction. In view of the express limitations in the arbitration clause under discussion, it is wholly unnecessary to speculate upon the motives, intent or purpose of the contracting parties. Where, as in the case at bar, the language in the contract is clear and unambiguous, the court is not justified in ignor-

ing it, or seeking to extend it beyond its plain meaning (*Graham* v. *Insurance Co.*, 43 F. [2d] 673, 674; *Hunt* v. *Triplex Safety Glass Co.*, 60 F. [2d] 92, 94).

The suggestion that neither of the parties had the Federal Arbitration Act in mind and did not consider the fact that one of the parties was a non-resident of New York, is purely speculative. The contract was approved by counsel (R. 32). It is fair to infer, therefore, that the parties were fully and properly advised regarding their rights and remedies. The court cannot speculate as to the reasonableness, or importance, of the limitations agreed upon by the parties, but must enforce them as found (*Burrows & Kenyon* v. *Warren*, 9 F. [2d] 1, 5).

It is not unreasonable or unfair to hold that the parties deliberately intended to confine themselves to the Arbitration Law of the State of New York and to the courts of that State, in the event arbitration were had. It is quite conceivable that the parties discussed the advantages and disadvantages of arbitration in different forums and under different statutes, and decided upon the courts and laws of the State of New York. However, speculation and conjecture are unnecessary. The parties agreed upon the forum and statute, and any deviation from their agreement is unjustified, either upon the facts or as a matter of law.

3.

In the court below it was suggested by defendant that, the District Court could grant a stay pending arbitration, under the provisions of the New York Statute. This contention is untenable. It is well settled that a Federal Court cannot enforce or grant relief under a state remedial statute. Thus, in *California Prune & Apricot Growers Assn.* v. *Catz American Co.*, 60 F. (2d) 788, the plaintiff appealed from an order directing it to proceed to arbitration in accordance with the terms of a certain agreement,

which required that defendant purchase from plaintiff the latter's entire stock of 1926 California prunes. The contract provided further that any disputes arising under the agreement be settled by arbitration before the Dried Fruit Association of California.

In reversing the order appealed from and denying the petition for arbitration, the Circuit Court held that a federal court has no jurisdiction to compel arbitration in accordance with a state statute, since such statute is purely remedial and creates no substantive rights which could be enforced by the federal court despite the provisions of the Conformity Act.

And in *Lappe* v. *Wilcox,* 14 F. (2d) 861, the court specifically held that a federal court could not grant a stay of proceedings under the New York State Arbitration Act. Thus, in denying the defendant's petition for a stay, the court said, at page 862, referring to the State Act:

> "And further there is nothing in the statute which suggests that it was intended to be extended beyond the courts of the state. While the statute does not in so many words refer or limit its provisions to state courts, that is its plain intent. Section 5, providing for staying the action expressly says: 'The Supreme Court [of New York State] or a judge thereof' shall grant such stay."

We submit that the power to grant a stay is incidental to and dependent upon the right to compel arbitration. It would result in an anomalous situation to hold that a court has the right to grant incidental relief, but no final relief. If the court lacks the power to enforce arbitration and follow the award to judgment—and this proposition, we believe, is clearly established—then, manifestly, it has no power to grant incidental relief, such as a stay pending arbitration.

In *The Silverbrook*, 18 F. (2d) 144, 147, it was said:

> "This court cannot direct and otherwise supervise and conclude an arbitration to be held in London, or assume to vacate, modify, or correct any award that might be made there. * * * *Nor has it power as a court of admiralty to arbitrarily reform, or modify the terms of the contract by ordering an arbitration elsewhere or otherwise than agreed upon by the parties.*
>
> Accordingly the motion to stay proceedings will be denied, and the cause will proceed in the usual course on the merits." (Italics ours.)

In the light of the foregoing authorities and the express limitations of the arbitration clause involved in the instant case, it is clear that the district court is without jurisdiction either to compel arbitration, or grant a stay pending arbitration. Such relief could only be granted by a state court, in an appropriate case.

POINT B.

No arbitrable dispute exists between the parties. Consequently, neither arbitration nor a stay pending arbitration may be had.

Defendant's application for a stay was predicated upon the assumption that disputes existed between the parties, which required arbitration under the terms of the contract. In this connection, it should be noted that defendant's moving papers do not specify the matters which it claims should have been arbitrated. In the briefs submitted in the lower courts, defendant enumerated a number of purported issues, which it claimed constituted proper subject matter for arbitration. Before considering the validity of the issue suggested by defendant, it is appropriate to in-

quire generally concerning the nature of the dispute which must exist, before arbitration may be invoked.

Frivolous or unconscionable issues may not be presented by a party as the basis for arbitration. Some degree of merit must attach to the matters concerning which arbitration is sought. Where a palpably fictitious, or unfounded, claim is asserted, an arbitrable issue is not presented.

Thus, in *Matter of Wenger,* 239 N. Y. 199, 202, the Court said:

> "Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration * * *."

Even the Federal Arbitration Act (9 U. S. C. A., Sec. 2) requires that the court be satisfied that an issue is involved which is referable to arbitration, before it may grant a stay.

In the instant case, we submit that an analysis of the record readily discloses the absence of any *genuine,* or meritorious, issue which could constitute the basis for arbitration. In considering the validity of any purported disputes, suggested by defendant, it should be borne in mind that the allegations of plaintiff's answering affidavits, concerning defendant's breach and repudiation of the contract, are uncontradicted. Hence, it appears that defendant not only has been guilty of grossly defaulting in its obligation to order and purchase coal, but, also, that it repudiated its contract when its unwarranted and unjustified demand for a price reduction was rejected. Clearly, defendant's conduct constituted an anticipatory breach of contract, which warranted the immediate commencement of the present action.

The Circuit Court, although refusing to hold that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration

clause, concluded that, upon the facts in the case at bar, defendant had not repudiated the contract. This conclusion overlooks the uncontradicted assertion in plaintiff's answering affidavits that defendant's officers at the conference held on December 5th, 1932, unequivocally stated that they would not order or purchase coal from plaintiff, unless the latter agreed to a price reduction (R. 43). Clearly, the stand taken by defendant constituted a repudiation which warranted plaintiff in treating the contract at an end, and commencing the present action.

In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 589, this court said:

> "It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligation * * * the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach."

In *Roehm* v. *Horst,* 178 U. S. 1, this court said, at page 8:

> "It is not disputed * * * also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

And at page 20, the court continued as follows:

> "If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in installments, then when the default happened in October 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years."

Other authorities to the same effect are:

Bu-Vi-Bar Petroleum Corp. v. *Krow,* 40 F. (2d) 488, 490, 493;
American Can Co. v. *Garnett,* 279 Fed. 722, 724;
Dixon v. *Anderson,* 252 Fed. 694, 695;
Henderson, etc. v. *Wilson & Co.,* 235 N. Y. 489, 499.

It was suggested by defendant, in the court below, that the question concerning its shortage in orders for coal, raises an issue which requires arbitration. This contention was predicated upon a suggested ambiguity as to the meaning of the language in the contract requiring that the orders for coal, during the three to five-year period of the contract, be "in as nearly equal monthly instalments as is practicable" and "spread over such period * * * in as even a manner as is practicable" (R., p. 27).

Thus defendant stressed the phrase "in as even a manner as practicable", and, failing to give due regard to the requirement that the orders be "in as nearly equal monthly instalments," urged that it had a period of five years within which to take the specified quantity of coal. In this regard, defendant contended that it had the right to delay ordering and purchasing coal until the end of the five-year period.

Manifestly, this construction renders meaningless the provision that the coal be taken "in as nearly equal monthly instalments". Giving defendant the benefit of the entire five-year period within which to order and purchase the specified quantity of coal, upon which theory the complaint proceeds, it would appear that defendant was obliged to take approximately 1250 gross tons of coal per month, during the five years.

We do not contend that defendant was obliged to take this exact quantity each month, but it is clear that this was a fixed average from which defendant could not deviate

substantially during the period of the contract, without placing itself in default. It is undisputed that, at the time the present action was commenced, defendant's arrears aggregated 16,173 gross tons (R. 41). On the basis of a five-year term, defendant, under the express requirements of the contract, was obliged to take approximately 31,250 gross tons, up to the time that this suit was instituted. Defendant, however, has ordered and purchased only approximately fifty per cent. of its quota. In the light of these circumstances, it is obvious that there has been a substantial deviation, on the part of defendant, from the requirements of its contract.

If the words "in as nearly equal monthly instalments" are to be given any meaning, they must be interpreted to mean that defendant obliged itself to order and purchase, on the average, approximately 1250 gross tons per month. The provision in question, therefore, rebuts the contention that defendant could refrain from ordering and purchasing coal until a few days prior to the termination of the five-year period.

Were defendant's contention sustained, it would be possible for it to refuse to order or purchase coal during the first four years and eleven months of the contract period, and then seek to impose upon plaintiff the obligation of delivering the entire 75,000 tons within the last month, or, carrying appellant's argument to its logical conclusion, on the last day of the agreement. Manifestly, the parties did not intend any such absurd and harsh result.

Defendant, having ordered and purchased only fifty per cent. of its requirements up to the time that suit was commenced, it is clear that it was in default. Apart from the question of its default, it is uncontradicted that defendant repudiated the contract in December, 1932. Consequently, no legitimate dispute as to defendant's liability for its failure to take the balance of its quota, is presented. The purported issues suggested by defendant, regarding its de-

fault and repudiation of the contract, are so palpably sham that they cannot be made the basis for arbitration.

In view of these circumstances, it is evident that plaintiff's refusal to ship seven cars of coal, unless such shipment be accepted without prejudice to its rights, does not create an arbitrable dispute. It is clear from the undisputed facts, that an anticipatory breach occurred. Plaintiff, therefore, was wholly within its rights in thereafter refusing to make any shipments unless the same be accepted without prejudice. If defendant's order were given in good faith, there was no valid reason why it should refuse to accede to plaintiff's request that the shipment be accepted without prejudice to the latter's rights.

It was suggested, also, by defendant that its alleged desire to continue the contract, presented an arbitrable issue. This alleged issue was predicated upon defendant's said order for seven cars of coal, which was given in January 1933. *After* defendant's repudiation and breach of the contract, plaintiff was not required to accept any belated gesture on the part of defendant to continue with the contract. Plaintiff clearly had the right, upon the occurrence of the breach and repudiation, to adopt the position that performance of the contract was no longer required and that it could maintain its suit for damages by reason of defendant's breach and repudiation. The latter's belated gesture, obviously made for the purpose of bolstering its application for a stay, came too late to create an arbitrable issue.

The conclusion is irresistible that defendant breached and repudiated its contract, and, therefore, that there are no substantial or legitimate arbitrable disputes between the parties, concerning the performance of their agreement.

POINT C.

The Circuit Court of Appeals erred in holding that a mere assessment of damage constitutes an arbitrable issue.

As a result of defendant's breach and repudiation of the contract, the only issue that remains for determination is the amount of damage sustained by plaintiff. The court below held that this issue alone would be enough to warrant arbitration, if the merits were otherwise conceded (R. 79). We submit the court erred in its conclusion.

A mere assessment of damage, divorced from the determination of any other dispute or controversy between the parties, does not fall within the purview of arbitration. It is well settled that, where the only duty that arbitrators could perform, is the determination, assessment, or appraisal of damage, arbitration may not be had. The ascertainment or assessment of the damage sustained by a part, is merely incidental and collateral to the main controversy, and is in no wise determinative thereof. Hence, it is not a controversy, within the meaning of the Arbitration Act, enforcible as an arbitration agreement. The courts have uniformly held that provisions for the ascertainment or assessment of damage do not constitute enforcible arbitrable agreements.

An analogous situation was presented in *Matter of American Insurance Co.,* 208 App. Div. 168. In that case, an appeal was taken from an order directing that the controversy existing between the parties be arbitrated. The application for arbitration was based upon an appraisal clause contained in a policy of insurance. This clause provided that, in the event of disagreement as to the amount of loss or damage, the insured and insurer should each

appoint an appraiser, and the appraisers so appointed should appoint an umpire, who, acting with the appraisers, would then determine the amount of loss or damage. In reversing the order granting arbitration and denying the motion, the court said at page 170:

> *"A distinction, however, has invariably been observed between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is not conclusive as to the ultimate rights of the parties, except the mere matter of amount due, and the submission of all the matters that are in controversy between the parties for final determination upon the whole issue.* The distinction has been preserved because the submission of a collateral fact or of a particular question, without making the whole controversy the subject of the determination of arbitrators, is not deemed a coercive means designed to put an end to the controversy between the contentious parties." (Italics ours.)

And at page 171, the court concluded:

> "The Arbitration Law itself does not extend the hitherto recognized type of arbitration so as to include within its embracement appraisals of incidental matters which are at times provided for in contracts, * * *."

In *Toledo S. S. Co.* v. *Zenith Transportation Co.*, 184 Fed. 391, the court said at page 401:

> "It has been frequently decided that *an agreement to submit to the decision of others a question involving only calculation or appraisement or the fixing of values and the like, * * * does not constitute an arbitration under the strict rules of the common law."* (Italics ours.)

Other authorities to the same effect are:

Matter of Fletcher, 237 N. Y. 440, 447;
Matter of Webster v. *Van Allen,* 217 App. Div. 219;
Wurster v. *Armfield,* 175 N. Y. 256, 264;
Grody v. *Silverman,* 222 App. Div. 526, 527;
Williams v. *Ins. Co.,* 118 Misc. 799, 801.

The mere fact that a controversy may exist as to the amount of damage, does not transform an appraisal clause into an arbitration agreement (*Williams* v. *Ins. Co., supra,* 803). Similarly, the mere fact that a controversy may exist in the case at bar concerning the amount of damage to which plaintiff is entitled, does not constitute such issue a basis for arbitration.

In the light of the foregoing authorities, it is clear that the assessment of damage, which is the only issue remaining for determination in the instant case, cannot be the subject for arbitration. Since there were no other matters referable to arbitration, no basis existed for defendant's motion, and its application for a stay was properly denied by the District Court.

POINT D.

Defendant waived and abandoned any rights which it possessed under the arbitration clause by reason of its unreasonable delay and laches.

It is well settled that the right to arbitration may be waived or abandoned by laches, or other conduct inconsistent with an intention to arbitrate. In the instant case, it appears conclusively that defendant has been guilty of unreasonable delay in seeking to enforce its alleged rights under the arbitration clause.

Thus, although the question of defendant's default was

called to its attention as early as the spring of 1932, defendant failed to request or compel arbitration, until it made its present belated application, which was brought on only after plaintiff had taken affirmative action. It appears further from defendant's moving papers that, even in January, 1933, its attention was called to plaintiff's position concerning defendant's failure to order and purchase coal, in accordance with the provisions of the agreement (R. 23, 36-38). If defendant honestly believed that there existed any issue between the parties, referable to arbitration, it was incumbent upon it, at that time, to demand arbitration.

It appears further that, although again advised of plaintiff's position and claims in April, 1933, when defendant's prior application for a stay was argued (R. 50-51), defendant failed to take any affirmative steps to demand or compel arbitration. If defendant actually desired arbitration, manifestly, it had ample opportunity to demand and compel arbitration.

Defendant has alleged merely that it was ready and willing to arbitrate the alleged issues between the parties, but nowhere in its moving papers does it claim that it demanded arbitration or selected an arbitrator. Defendant has been content to stand by idle, without making any effort to obtain arbitration. At no time did it seek to compel arbitration. Defendant requested merely a stay of proceedings until arbitration could be had. Apparently, defendant merely desired to stay plaintiff from proceeding further and was content to let the situation remain in such indefinite state. If defendant's protestations that it has been ready and willing to arbitrate, were sincere, it would have long since moved to compel arbitration, and not merely to stay plaintiff.

It is evident that defendant sought to use the Arbitration Act as a means of gaining delay. The court should

not have assisted defendant in accomplishing this object. It was aptly said in *Matter of Zimmerman* v. *Cohen,* 236 N. Y. 15, 21:

> "The Arbitration Law was passed to expedite and facilitate the settlement of disputes and overcome the delay caused by litigation. It was not intended that such law should be used as a means of furthering and extending that delay."

Defendant has been guilty of unreasonable delay and procrastination. The Arbitration Act may not be invoked by a party who has been guilty of unreasonable delay.

In *Nagy* v. *Arcas Brass & Iron Co.,* 242 N. Y. 97, the court said:

> "* * * unreasonable delay in making the proper application may justify a finding of waiver."

And at page 99, the court said:

> "But the Arbitration Law contemplates prompt action and too long a delay in seeking appropriate relief may be construed as an indication that this claim is waived."

See also:

> *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, aff'd 186 N. Y. 611.

The court below held that a mere expression of willingness to submit to arbitration, was a sufficient answer to plaintiff's objection that defendant was in default in proceeding with arbitration (R. 78). We submit that a rule which establishes such criterion, is erroneous. The Federal Arbitration Act (9 U. S. C. A. Sec. 3) provides that the court:

> "* * * shall on application of one of the parties stay the trial of the action until such arbitration

has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Italics ours.)

Clearly, something more than a mere expression of willingness to arbitrate, belatedly made upon an application to obtain a stay, is required of the movant. The latter must adduce *facts* showing supporting the assertion of readiness and willingness to submit to arbitration. A bare assertion, unaccompanied by any substantiating facts, is insufficient. In the case at bar, defendant's conduct and actions—or lack of action—belie its assertion of willingness to submit to arbitration.

Clearly, both State and Federal Acts require that the party seeking arbitration, or a stay until arbitration is had, act promptly. To grant a stay in the case at bar, in view of defendant's unreasonable and unexplained delay, places a premium on delay in enforcing arbitration, thereby frustrating the purpose and intention of the Arbitration Law, which is to secure a speedy termination of a controversy. Defendant's unreasonable delay in seeking to compel arbitration, constituted a bar to its application for a stay.

CONCLUSION.

For the reasons stated in the petition and this brief, it is respectfully submitted that this application for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE C. LEVIN,
Counsel for Petitioner.

ALFRED B. NATHAN,
LOUIS H. MOOS,
BENJAMIN LEWIS,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

BRIEF FOR PETITIONER.

ALFRED B. NATHAN,
Counsel for Petitioner.

LOUIS H. MOOS,
BENJAMIN LEWIS,
Of Counsel.

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OCTOBER TERM, 1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

BRIEF FOR PETITIONER.

Opinions Below.

The Circuit Court of Appeals for the Second Circuit, granted appellee's motion for a stay pending arbitration, reversing the order of the District Court for the Southern District of New York, and rendered an opinion which is reported in 70 F. (2d) 297, and which appears at page 73 of the record.

The District Court rendered an opinion, which does not appear to be as yet officially reported. This opinion appears at page 61 of the record.

Jurisdiction.

A petition for a writ of certiorari was filed July 21st, 1934, and granted October 8th, 1934.

Jurisdiction of this Court is based upon Judicial Code, Sec. 240, as amended by the act of February 13th, 1925 (28 U. S. C. A. Sec. 347).

The jurisdiction in the District Court was based upon the diversity of citizenship.

Nature of the Case.

By this writ petitioner seeks to review the order of the Circuit Court, which reversed the order of the District Court, and granted appellee's application for a stay of all proceedings pending arbitration.

The complaint contains two causes of action. The first sought to recover damages for appellee's breach and repudiation of a contract for the sale and delivery of coal, entered into by it with The Hudson Coal Co., petitioner claiming to be the beneficiary designated by the contracting parties to receive the benefits of the said contract (R. 3-7). This cause of action was not involved on appellee's motion for a stay.

The second cause of action seeks to recover damages for appellee's breach and repudiation of a contract entered into by it directly with petitioner. By the terms of the said contract, appellee agreed to purchase from petitioner 75,000 gross tons of anthracite coal, of certain specified sizes, in a period of not less than three nor more than five years. The contract provided further that appellee would order and accept delivery of the coal, during such period, in as equal monthly installments as practicable, it being agreed that delivery of said coal by petitioner and its acceptance by appellee should extend over said period of not less than three nor over five years, in as even a manner as practicable (R. 8).

The complaint then alleges that under this contract, appellee was obligated to order and accept from

petitioner, on the average, at least 1250 gross tons of coal per month. The second cause alleges further that appellee, since December 1st, 1931, without just cause, neglected and refused to order, accept or pay for at least an average 1250 gross tons of coal per month, as required by its agreement, but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has failed to order or accept any coal whatsoever from petitioner; that appellee was in default, under its said agreement, to the extent of approximately 16,173 gross tons of coal, and that prior to the commencement of this action, appellee notified petitioner it would not order, accept or pay for coal as provided in its agreement, and repudiated the same (R. 8-9).

It is then pleaded that petitioner, at all times mentioned, was ready, able and willing to perform the said agreement, with respect to furnishing, selling and delivering coal as required by the agreement, and, would have furnished, sold and delivered the same, but for appellee's said neglect, refusal and repudiation. It is alleged further that there remains to be delivered to appellee, under said agreement, in all, a balance of 52,309 gross tons of coal (R. 9).

The complaint then alleges that petitioner, as appellee well knew, was entitled to and received commissions, under an agreement which it had with The Hudson Coal Co., for all coal sold and delivered by petitioner to appellee, under its contract with the latter. Accordingly, petitioner seeks to recover, under its second cause of action, as damages for appellee's breach and repudiation, commissions in the sum of $9,851.74, which it claims it would have earned if appellee had fully performed its agreement (R. 9-10).

Appellee, after service of the complaint, made a motion addressed to the sufficiency of the *first* cause of action, seeking a dismissal thereof upon the ground that it failed to set forth facts sufficient to constitute a cause of action (R. 17). The District Court granted this motion, holding that petitioner was merely an incidental beneficiary, and as such, could not sue on the contract entered into between appellee and The Hudson Coal Co. An appeal was taken by petitioner from the order and judgment dismissing its said first cause of action, to the Circuit Court of Appeals, Second Circuit. That Court affirmed the said order and judgment, without opinion. A petition for a writ of certiorari to review the said judgment, was denied by this Court, in October, 1934.

Simultaneously with its motion to dismiss the first cause of action, and before answering, appellee moved for an order staying all proceedings under the second cause of action, pending arbitration. This application was predicated upon a clause in the contract between petitioner and appellee, which provided for arbitration. The District Court denied the motion, without prejudice to a renewal thereof, on the ground that it was premature and could not be entertained until issue had been joined by the service of an answer (R. 17-18).

Appellee served its answer on July 27th, 1933, and thereafter renewed its motion for a stay pending arbitration, upon the pleadings and upon the affidavits and papers submitted upon its former motion, and upon an additional affidavit setting forth the proceedings already had. The motion came on to be heard simultaneously with a motion by petitioner to strike out appellee's second separate defense which pleaded the arbitration agreement and petitioner's failure to arbitrate (R. 18).

Appellee's motion was denied by the District Court. Appellee thereupon appealed to the Circuit Court of Appeals, Second Circuit, from the order denying its said application. That Court reversed the said order and granted appellee's motion.

It is claimed in appellee's moving affidavits that a dispute exists between the parties as to the performance of the agreement. In this connection, appellee asserts that, subsequent to the execution of the agreement, it ordered the shipment of coal, from time to time, and that petitioner complied with such orders, to and including the month of December, 1932 (R. 22).

It is stated further in appellee's affidavits that, on January 3rd, 1933, it placed an order for the shipment of seven cars of coal; that thereafter appellee received a letter from petitioner charging appellee with being in default in the placing of orders under the existing contracts and refusing to accept the order in question, unless appellee conceded that the acceptance thereof was without prejudice to petitioner's rights (R. 22-23, 35-36).

It is asserted further in the said affidavits that appellee's vice-president, Mr. Elkind, conversed with petitioner's president, Mr. Goodenough, with reference to the said letter received from petitioner, and urged that appellee was not in default under its contracts. It is claimed that Mr. Goodenough agreed that he saw no reason why his company should not fill the order for the seven cars of coal and agreed to do so (R. 23).

Appellee then states that a letter was received from petitioner's attorneys, declining to ship the coal in compliance with appellee's order. It is claimed that, after receipt of the said letter, appellee's president, Mr. Couzens, again conversed with Mr. Goodenough, and urged that the order be accepted. It is claimed,

also, that, prior to the giving of this order, Mr. Couzens had some discussion with appellee's officers and that no contention was made on the part of petitioner, prior to January 5th, 1933, that appellee was in default in purchasing coal under its agreement (R. 23-24).

The conclusion is then asserted that appellee always has always been ready and willing to arbitrate its dispute with petitioner, in accordance with the contract provisions, and, still is ready and willing to comply with all of the terms of the contract, and to order and accept, within the contract terms, the amount of coal required to be ordered (R. 24).

The contract provisions relating to the arbitration of disputes between the parties, reads as follows:

> "In case any dispute should arise between the Buyer and the Seller as to the performance of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. *In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York*" (R. 31). (Italics ours.)

The answering affidavits interposed by petitioner, disclose the lack of merit in appellee's application. Thus, it is shown that, at the time the present action was instituted, in March 1933, appellee was in default

to the extent of approximately 16,173 gross tons of coal, even on the basis of a five year term. Appellee's delinquency first occurred in December 1931 (R. 41).

The default continued until the spring of 1932, when petitioner's president, Mr. Goodenough, communicated with appellee's vice-president, Mr. Elkind, and called the latter's attention to the fact that appellee was far behind its quota. Mr. Elkind admitted his company had not been ordering and purchasing coal in the quantities required by its contract, but explained that the failure to do so was due to business conditions, promising that appellee would make up its arrears in the fall, when conditions were expected to improve (R. 42).

Appellee, however, continued in default. In September 1932, Mr. Goodenough again communicated with Mr. Elkind and called the latter's attention to the situation, pointing out that appellee was in arrears. Further assurances were given that appellee would make up its arrears shortly. These promises, however, were not fulfilled. Consequently, in December 1932, Mr. Goodenough arranged a conference with Mr. Elkind, at the latter's office, for the purpose of discussing the situation, with a view towards having appellee meet its arrears, in accordance with the promises and assurances theretofore given (R. 42).

The conference was held on December 5th, 1932. Mr. Goodenough and Mr. Hayes, petitioner's New York sales manager, were present as the latter's representatives. Mr. Elkind and Mr. Couzens represented appellee. Mr. Goodenough pointed out that appellee was far behind its quota and requested that immediate arrangements be made, in accordance with the assurances theretofore given, to eliminate the arrears (R. 42-43).

Then, for the first time, the true reason for appellee's default and its failure to comply with its contract were disclosed. *Mr. Elkind stated that the reason for appellee's continued failure to purchase coal from petitioner in compliance with the contract, was due to the fact that appellee could obtain coal from other sources at prices lower than those required to be paid by the terms of the contract. Mr. Elkind stated further that, unless petitioner modified the existing contract, by reducing the prices of its coal, appellee would not order or purchase any coal from petitioner* (R. 43).

Despite Mr. Goodenough's attempt to persuade Mr. Elkind that appellee should abide by its agreement, Mr. Elkind refused to change his position, and, asserted that appellee would not purchase any more coal from petitioner unless the prices required to be paid under said agreement, were reduced. After conferring with his associates, Mr. Goodenough found that such arrangement could not be made, and finally so advised Mr. Elkind (R. 43).

It is clear that *appellee* intentionally defaulted and then deliberately repudiated its contract, when it could not bludgeon petitioner into meeting its unwarranted and unjustified demand for a price reduction. In this regard it will be noted that the facts concerning appellee's breach and repudiation of the contract as set forth in petitioner's answering affidavits, have never been denied by appellee, although the latter had ample opportunity to do so. Thus, when appellee renewed its motion for a stay, it was fully familiar with petitioner's contentions regarding the default and repudiation. Upon the argument of the first motion for a stay, in April, 1933, petitioner's counsel delivered to appellee's attorney, copies of petitioner's answering affidavits, which were substantially similar in content

to the answering affidavits submitted by petitioner upon the renewal of appellee's application (R. 50).

The latter's failure to take issue with petitioner's version of the default and repudiation of the agreement, either on its first motion, or, when it later renewed its application, must be deemed an admission of the truth of petitioner's charges. Under these circumstances, it is evident that there is no *bona fide* dispute concerning the performance of the contract, referable to the arbitration.

On January 3rd, 1933, when appellee placed an order for a small quantity of coal, it was substantially in default under its contract. Petitioner, however, was willing to fill this order, on condition that its acceptance thereof be without prejudice to its rights under the contract. Since appellee refused to accede to this reasonable request, the shipment was not made (R. 43).

The assertion in the affidavit submitted by Mr. Elkind in support of appellee's application for a stay, to the effect that he advised Mr. Goodenough that appellee was not in default and urged that the question of any existing default be settled in a proper manner, is denied by Mr. Goodenough, who alleges that Mr. Elkind merely stated his concern would not acquiesce in petitioner's suggestion that the shipment of coal be made without prejudice. In this regard, Mr. Elkind stated, according to Mr. Goodenough, that petitioner could either ship the coal or cancel the order. Mr. Goodenough, as appears from his affidavit, thereupon informed Mr. Elkind that petitioner could not make the shipment, unless it be accepted without prejudice to petitioner's rights (R. 44). A letter confirming this position was sent to appellee by petitioner's counsel (R. 37-38).

Appellee's moving papers are noteworthy for a significant omission. Nowhere in the moving affidavits, does there appear any unequivocal assertion that appellee is not in default under its contract. Manifestly, appellee could not truthfully make such assertion, since the undisputed facts show clearly that it was in default to the extent of approximately 16,173 gross tons of coal, when the present action was commenced (R. 41), and that it had repudiated its contract with petitioner, taking the unjustifiable position that it would not perform its agreement, unless the latter complied with its unwarranted and unjustified demand for a price reduction (R. 43).

In opposing appellee's application for a stay, petitioner seasonably urged the objection that a stay should not be granted because there was no arbitrable dispute or controversy between the parties (R. 45-46). Petitioner urged, also, the jurisdictional objection that any application, either to compel arbitration, or to obtain a stay, could be made only in the Supreme Court of the State of New York, in view of the express provisions in the contract requiring not only arbitration to be had in accordance with the statute in that State but application therefor to be made in the State Court (R. 46).

Finally, petitioner pointed out that appellee was not acting in good faith and that it was guilty of laches which barred it from obtaining either arbitration, or a stay pending arbitration (R. 51-52). Since the foregoing objections find ample support in the record, the Court below erred in granting a stay pending arbitration.

POINT I.

The Circuit Court erred in reversing the order which denied defendant's motion for a stay pending arbitration. Since the express provisions of the contract limit the parties, in the event arbitration is desired, to an application to the New York Supreme Court for an order compelling arbitration, in accordance with the Arbitration Law of New York, the Federal Court is not the proper forum to grant a stay pending arbitration.

1.

Courts may not disregard the agreement of parties, designating the forum, or tribunal, where arbitration is to be enforced, and the law under which arbitration shall proceed.

After pointing out that the decisions in the district courts are in conflict upon the proposition (R. 76), the court below ruled that an agreement to submit to arbitration in a foreign court, justifies a stay of an action brought on the contract elsewhere, resting its conclusion upon the authority of several decisions by the English courts. In reaching this conclusion, we believe the court below erred.

We submit that the view taken by the District Court, is the correct one. That court, in denying appellee's motion for a stay, said:

> "To be specifically enforcible in a particular forum an agreement for arbitration must not provide for an arbitration outside the jurisdiction of that forum or under any arbitration law other than the arbitration law of that forum.

Cf. The Beechwood, 35 F. (2d) 41, 42-43; *The Silverbrook,* 18 F. (2d) 144, 145-146; *The Fredensbro,* 18 F. (2d) 983, 984-985. For otherwise the Court which specifically enforces the arbitration agreement would find itself without power adequately to follow up the situation, and see that its order or decree is performed by the party against whom it is made.

Inasmuch as the parties by their agreement have arranged to arbitrate the disputes arising under the contract, which is the subject matter of this suit, and have contractually agreed on the forum in which that arbitration clause is to be enforced, I think that the proper procedure for me to follow is to deny the defendant's motion in this cause for a stay pending arbitration, and to leave it to the remedies of which it may be able to avail itself in the New York Supreme Court under the Arbitration Law of New York State" (R. 62-63).

The arbitration clause involved in the case at bar expressly provides that, in the event arbitration is desired, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of the arbitration clause, in accordance with the Arbitration Law of the State of New York (R. 31). By reason of this provision, it is evident that the parties have agreed upon the forum to which application may be made, and the law which shall govern. Clearly, since the parties designated the particular forum to which application to compel arbitration should be made, and the law under which such arbitration should proceed, it cannot now be urged that arbitration, *or relief incidental thereto,* may be sought in some other forum and under some other law than that agreed upon by the parties.

To sustain such contention would require rewriting the contract and making a new agreement for the parties. The plain intent of the parties, however, may not be disregarded, and, the court may not make a new contract, under the guise of construing or interpreting the agreement (*Magna Fire Ins. Co.* v. *Pospisil,* 52 F. (2d) 709, 711; *Kearns-Gorsuch Co.* v. *Hartford-Fairmont Co.,* 1 F. (2d) 318, 319; *Schoonmaker* v. *Hoyt,* 148 N. Y. 425, 431).

The parties to a contract must abide by the terms thereof, and the mere fact that one of them subsequently deems his bargain a bad one, or disadvantageous, does not justify the court in permitting a repudiation of the unsatisfactory terms, nor does it warrant the court in making a new agreement by a process of construction or implication (*Rosenthal* v. *American Bonding Co.,* 207 N. Y. 162, 168-169; *Lockwood* v. *Embalmers Supply Co.,* 233 App. Div. 180, 194).

In view of the principles enunciated by the foregoing authorities, it is clear that the express provisions of the arbitration clause may not be disregarded. By the terms thereof the parties have definitely fixed the Supreme Court of the State of New York as the forum for arbitration, and the Arbitration Act of that State, as the law under which arbitration shall proceed. Their agreement is binding and should not be disregarded either by the parties or by the court.

In *Gilbert* v. *Burnstine,* 255 N. Y. 348, 354, the court said:

> *"Defendants' agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced. Otherwise the inference must be*

drawn that they never intended to abide by their pledge. They contracted that the machinery by which their arbitration might proceed would be foreign machinery operating from the foreign court. No other fair conclusion can be drawn from their language. Their contract constitutes something more than a simple executory one subject to breach. Not only under the foreign statute but also under our own arbitration law, it has become irrevocable in the sense that one of the parties without the consent of the other cannot deprive it of its enforcibility.

* * * * * * *

Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought." (Italics ours.)

The *Gilbert* case is not distinguishable in principle from the case at bar. In both cases, the parties expressly fixed the forum and the law under which arbitration should be had. In the instant case, the arbitration clause provides that, in the event arbitration is to be had, it shall be upon application to the State court and in accordance with the State Act. Applying the maxim *expressio unius est exclusio alterius,* it follows that any other forum or law than the one specified, must be excluded.

In *Matter of Marchant* v. *Mead-Morrison M. Co.,* 252 N. Y. 284, the court recognized the principle that where the parties have agreed upon the locality where arbitration is to proceed, their agreement must be recognized by the court. In the *Marchant* case, the defendant, who had been directed to submit to arbitration, subsequently appealed from a judgment which

sustained in part an award of the arbitrators holding that defendant breached its contract. On appeal, defendant argued that the order directing arbitration was void because the parties to the contract, in agreeing to arbitrate their differences, had in view an arbitration in Massachusetts, and not performance elsewhere.

An appeal had been taken by the defendant from the order directing arbitration, but the Appellate Division affirmed the order compelling defendant to submit to arbitration, and, leave to appeal to the Court of Appeals was denied.

In the *Marchant* case, the contract was closed in Massachusetts and in that State the tractors, which were the subject of the contract, were to be manufactured and delivered. Unlike the agreement in the instant case, the contract in the *Marchant* case did not specify the jurisdiction, or the tribunal, where arbitration should be had. The Court of Appeals, upon the appeal from the judgment, sustaining in part the award of the arbitrators, held that the order directing arbitration was not void, and, therefore, could not be assailed collaterally on the appeal then before it. The court, per Cardozo, *Ch. J.*, did say, however, in the following significant language, at page 293:

> "The statute of New York does not bring into being the contract into being, but adds a new implement, the remedy of specific performance, for its more effectual enforcement. This remedy may lawfully be extended to contracts of manufacture made in Massachusetts and there to be performed, *unless it is one of the terms of the arbitration clause, implied if not expressed, that the arbitration shall proceed in a particular locality.*" (Italics ours.)

In the case at bar, the contract expressly provides that, in the event either of the parties is compelled to obtain the sanction of a court, in order to enforce arbitration, application is to be made to the Supreme Court of the State of New York for an order compelling arbitration in accordance with the arbitration laws of that State (R. 31). In view of this limitation, and in the light of the rule enunciated by the foregoing authorities, it is clear that, in the event either party sought relief relating to arbitration, it was limited to an application to the New York Supreme Court. Consequently, the Circuit Court was not justified in entertaining appellee's application for a stay pending arbitration, but should have followed the District Court's determination, denying the application without prejudice to a renewal thereof in the proper tribunal—the New York Supreme Court.

It was suggested by appellee in the lower courts that, as the contract in question was made in New York, and was to be performed partly in that State, the contracting parties had in mind the benefits of the New York statute, but in no way intended to exclude any other forum or the Arbitration Act of any other jurisdiction. In view of the express limitations in the arbitration clause under discussion, it is wholly unnecessary to speculate upon the motives, intent or purpose of the contracting parties. Where, as in the case at bar, the language in the contract is clear and unambiguous, the court is not justified in ignoring it, or seeking to extend it beyond its plain meaning (*Graham* v. *Insurance Co.*, 43 F. [2d] 673, 674; *Hunt* v. *Triplex Safety Glass Co.*, 60 F. [2d] 92, 94).

The suggestion that neither of the parties had the Federal Arbitration Act in mind and did not consider the fact that one of the parties was a non-resident of

New York and so might sue in the Federal Courts, is purely speculative. The contract was approved by counsel (R. 32). It is fair to infer, therefore, that the parties were fully and properly advised regarding their rights and remedies. The court cannot speculate as to the reasonableness, or importance, of the limitations agreed upon by the parties, but must enforce them as found (*Burrows & Kenyon* v. *Warren,* 9 F. [2d] 1, 5).

It is not unreasonable or unfair to infer that the parties deliberately intended to confine themselves to the Arbitration Law of the State of New York and to the courts of that State, in the event arbitration were had. It is quite conceivable that the parties discussed the advantages and disadvantages of arbitration in different forums and under different statutes, and decided upon the courts and laws of the State of New York. However, speculation and conjecture are unnecessary. The parties agreed upon the forum and statute, and any deviation from their agreement is unjustified, either upon the facts or as a matter of law.

2.

Courts will not enforce performance of agreements that require arbitration to proceed in another jurisdiction.

It is well settled that a court will not enforce performance of an agreement requiring arbitration to proceed in another jurisdiction. Thus, in *Matter of Inter-Ocean Food Products Inc.,* 206 App. Div. 426, 432-433, the court, in reversing an order which directed arbitration to proceed without the State, said:

> "The general trend of authority, it seems to me, is that no court will willingly relinquish

> jurisdiction over controversies arising between those who are amenable to its judgment, *nor will any sovereignty order its citizens or subjects to go before the tribunals of another sovereignty and submit to its jurisdiction that their differences may be adjudicated.*
>
> I am of the opinion that while an agreement to arbitrate in a foreign jurisdiction, and before a foreign arbitrator is not invalid or illegal, it cannot be enforced as between citizens of this State who are parties thereto, by compelling them to go without the State, in a foreign jurisdiction and before a foreign tribunal, there to arbitrate their disputes." (Italics ours.)

The court added that, in its opinion, a stay proceedings could be granted under the circumstances presented, but since this question had not been raised, it is evident the court's expression of opinion was merely dictum.

In *Matter of California Packing Corp.,* 121 Misc. 212, 213, the court, in considering a similar situation, ruled as follows:

> "I do not believe under the Arbitration Law this court may compel the respondent to arbitrate before a foreign corporation without the state, for the reason that no award taken without the state may be the basis of a judgment."

Other authorities to the same effect are:

> *The Silverbrook,* 18 F. (2d) 144, 147;
> *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.,* 222 Fed. 1006.

3.

The granting of a stay pending arbitration is an indirect method of compelling arbitration, and, therefore, should be limited to cases where the court has the power to compel arbitration.

A stay, manifestly, is a coercive measure. It prohibits further proceedings until the party stayed complies with the terms upon which it was granted. Hence, where proceedings are stayed pending arbitration, the party against whom the stay is directed, is compelled to arbitrate, if he desires relief. Obviously, such stay is an indirect method of enforcing arbitration.

However, since a court may not enforce an agreement that requires arbitration to proceed in another jurisdiction, it would be inconsistent to hold it may grant a stay, under such agreement, pending arbitration. Clearly, a stay under such circumstances permits the accomplishment, indirectly, of an act that the court could not directly require to be performed. Consequently, the granting of a stay pending arbitration of necessity, must be limited to cases where the court can compel arbitration.

In the case at bar, the court could not compel arbitration since the agreement of the parties required arbitration to proceed in the tribunal of another jurisdiction. Hence, the court had no power to grant a stay pending arbitration, since the granting of such relief constituted an indirect method of enforcing arbitration.

4.

The granting of a stay under the United States Arbitration Act is limited to cases where the court could compel arbitration.

Appellee may not invoke the Federal Arbitration Act as a basis for obtaining relief pertaining to arbitration, because that Act applies only to arbitration agreements that can be performed under the jurisdiction of the United States courts, and, which do not require a submission to some other tribunal and under a different statute. Section 3 of the Federal Act provides that a stay may be granted in any suit or proceeding brought in any of the courts of the United States, where an arbitrable issue exists, if the Court be satisfied that the issue involved is referable to arbitration under the agreement between the parties.

Section 4 gives the Federal Court power to compel arbitration where it would have had jurisdiction at law, in equity or in admiralty, save for the arbitration agreement.

These two sections must be read together. Thus considered, it is evident that the agreement to arbitrate, referred to in Section 3, upon which the court could grant a stay, is an agreement that the court would have the power to enforce under Section 4. However, under Section 4, a Federal Court cannot compel arbitration where the agreement requires that the proceeding be had in a different forum and under a specific State statute, both upon general principles which prohibit a court from enforcing an agreement that calls for arbitration in another jurisdiction, and, by virtue of the requirement in Section 4, limiting the court's jurisdiction to proceedings held within the

district in which the petition for an order directing such arbitration is filed. It follows that the court lacks the power to grant a stay, pending arbitration in a case, such as that at bar, where the agreement requires arbitration to be held in another jurisdiction.

A similar situation was presented in *The Silverbrook,* 18 F. [2d] 144, where the parties had expressly agreed that their differences were to be arbitrated in London in accordance with the English laws. In denying an application for a stay, pending arbitration, the court said at page 146:

> "It is plain enough that Congress intended to abolish the old rule, established in the jurisprudence, by which the federal courts refused to enforce arbitration agreements. But, however, the act seems to contemplate only such arbitration agreements as would be or could be carried out in the United States, within the jurisdiction of *and under the control and orders of the United States courts,* and therefore it provided in specific and limited terms the character of agreements by which, and the manner in which, parties can provide for and proceed with arbitration." (Italics ours.)

And at page 147, the court concluded as follows:

> "* * * this court is without jurisdiction to direct the parties to proceed to arbitration as required by the concluding clause of that section, because the place and manner of arbitration prescribed by the terms of the contract, are beyond the jurisdiction of this court, *since the hearings and proceedings thereunder cannot be held conformable to the terms of this statute,* and particularly to Section 4, which requires

> the arbitration to proceed within the district in which the petition for an order directing such arbitration was filed." (Italics ours.)

See also:

The Beechwood, 35 F. [2d] 41, 42-43.

In the *Beechwood* case, *supra,* the court pointed that, under well settled rules, the general language of the Federal Arbitration Act must be deemed limited in application, so as not to embrace arbitrations beyond the court's jurisdiction. Clearly, it is essential to the granting of a stay pending arbitration, by a Federal court, that the arbitration agreement provide for arbitration within the jurisdiction of and under the control and order of such court. Where, as in the instant case, arbitration is to be had in another forum, and under another law, it is beyond the power of the Federal court, either on common law principles or under the Federal Arbitration Act, to grant a stay of proceedings pending arbitration.

It is true that in the English cases relied upon by the Circuit Court (*Law* v. *Garrett,* L. R. 8 Ch. Div. 26 [C. A.]; *Austrian, etc. Co.* v. *Graham, etc. Society,* L. R. [1903] 1 K. B. 249; *Kirchner* v. *Graham* [1909], 1 Ch. Div. 413; *The Cap Blanco* [1913], Pr. Div. 130), stays were granted under arbitration agreements which required the parties to submit to a foreign court. In these cases, however, stays were granted because under the English Arbitration Act a stay of proceedings is the only method available for the specific enforcement of arbitration agreements. The English Act contains no other provision for the enforcement of arbitration, and, unlike the United States Arbitration Act, contains no clause which limits the granting of a stay to cases where the court has the power to compel arbitration.

We submit that the power to grant a stay is incidental to and dependent upon the right to compel arbitration. It would be anomalous to hold that a court has the right to grant incidental relief, but no final relief. If the court lacks the power to enforce arbitration and follow the award to judgment—and this proposition, we believe, is clearly established—then, manifestly, it has no power to grant incidental relief, such as a stay pending arbitration.

In *The Silverbrook, supra,* page 147, it was said:

> "This court cannot direct and otherwise supervise and conclude an arbitration to be held in London, or assume to vacate, modify, or correct any award that might be made there. * * * *Nor has it power as a court of admiralty to arbitrarily reform, or modify the terms of the contract by ordering an arbitration elsewhere or otherwise than agreed upon by the parties.*
>
> *Accordingly the motion to stay proceedings will be denied,* and the cause will proceed in the usual course on the merits." (Italics ours.)

In the light of the foregoing authorities and the express limitations of the arbitration clause involved in the instant case, it is clear that the Circuit Court was without jurisdiction either to compel arbitration, or grant a stay pending arbitration.

5.

The State Arbitration Act may not be invoked as a basis for granting a stay in this action.

In the court below it was urged by appellee that the District Court could grant a stay pending arbitration, under the provisions of the New York

statute. This contention is untenable. It has been held that a Federal court cannot enforce or grant relief under a state remedial statute. Thus, in *California Prune & Apricot Growers Assn.* v. *Catz American Co.,* 60 F. (2d) 788, the plaintiff appealed from an order directing it to proceed to arbitration in accordance with the terms of a certain agreement, which required that defendant purchase from plaintiff the latter's entire stock of 1926 California prunes. The contract provided further that any disputes arising under the agreement be settled by arbitration before the Dried Fruit Association of California.

In reversing the order appealed from and denying the petition for arbitration, the Circuit Court held that a Federal court has no jurisdiction to compel arbitration in accordance with a state statute, since such statute is purely remedial and creates no substantive rights which could be enforced by the Federal court, despite the provisions of the Conformity Act.

And in *Lappe* v. *Wilcox,* 14 F. (2d) 861, the court specifically held that a Federal court could not grant a stay of proceedings under the New York State Arbitration Act. Thus, in denying the defendant's petition for a stay, the court said, at page 864, referring to the State Act:

> "And further there is nothing in the statute which suggests that it was intended to be extended beyond the courts of the state. While the statute does not in so many words refer or limit its provisions to state courts, that is its plain intent. Section 5, providing for staying the action expressly says: 'The Supreme Court [of New York State] or a judge thereof' shall grant such stay."

POINT II.

No arbitrable dispute exists between the parties. Consequently, neither arbitration nor a stay pending arbitration may be had.

Appellee's application for a stay was predicated upon the assumption that disputes existed between the parties, which, under the terms of the contract, required arbitration. In this connection, it should be noted that appellee's moving papers do not specify the matters which it claims should have been arbitrated. In the briefs submitted in the lower courts, appellee enumerated a number of purported issues, which it claimed constituted proper subject matter for arbitration. Before considering the validity of the issues thus suggested, it is appropriate to inquire generally concerning the nature of the dispute which must exist, before arbitration may be invoked.

Frivolous or unconscionable issues may not be presented by a party as the basis for arbitration. Some degree of merit must attach to the matters concerning which arbitration is sought. Where a palpably fictitious, or unfounded claim is asserted, an arbitrable issue is not presented.

Thus, in *Matter of Wenger & Co.,* 239 N. Y. 199, 202, the Court said:

> "Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration * * *."

Even the Federal Arbitration Act (9 U. S. C. A., Sections 3 and 4) requires that the court be satisfied

that an issue is involved which is referable to arbitration, before it may grant a stay.

In the instant case, we submit that an analysis of the record readily discloses the absence of any *genuine* issue which could constitute the basis for arbitration. In considering the validity of any purported disputes, suggested by appellee, it should be borne in mind that the allegations of petitioner's answering affidavits, concerning appellee's breach and repudiation of the contract, are uncontradicted.

In this connection, it will be noted that petitioner commenced the present action only after it appeared that appellee had no intention of fulfilling its obligations under the contract. Thus, when suit was commenced, appellee was in default to the extent of approximately 16,173 gross tons of coal (R. 41). In other words, up to the time the action was commenced, appellee had ordered only approximately fifty per cent. of the contract requirements. Furthermore, suit was commenced only after appellee's unequivocal refusal to continue to order and purchase coal, as required by its agreement. In view of these circumstances, it is manifest that appellee's conduct constituted an anticipatory breach of contract which warranted the immediate commencement of the present action.

The Circuit Court, although refusing to hold that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration clause, concluded that, upon the facts in the case at bar, appellee had not repudiated the contract (R. 79). This conclusion overlooks the uncontradicted assertion in petitioner's answering affidavits that appellee's officers at the conference held on December 5th, 1932, unequivocally stated that they would not order or purchase coal from petitioner un-

less the latter agreed to a price reduction (R. 43), and appellee's admitted default. Clearly, the stand taken by appellee constituted a repudiation which warranted petitioner in treating the contract at an end, and commencing the present action. Similarly, appellee's default justified petitioner in treating the contract as definitely breached by the former.

In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 589, this court said:

> "It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligation * * * the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach."

In *Roehm* v. *Horst,* 178 U. S. 1, this court said, at page 8:

> "It is not disputed * * * also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

And at page 20, the court added:

> "If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in installments, then when the default happened in October 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of

the agreement to deliver during the two remaining years."

Other authorities to the same effect are:

Bu-Vi-Bar Petroleum Corp. v. *Krow,* 40 F. (2d) 488, 490, 493;
American Can Co. v. *Garnett,* 279 Fed. 722, 724;
Dixon v. *Anderson,* 252 Fed. 694, 695;
Henderson, etc. v. *Wilson & Co.,* 235 N. Y. 489, 499.

Upon the undisputed facts and in the light of the foregoing authorities, it is submitted that petitioner's right to recover damages for appellee's breach and repudiation of the contract, is clear, and, that the only question which remains for determination is the amount of such damages. This issue, however, as we will hereinafter demonstrate, does not constitute an arbitrable dispute.

It was suggested by appellee, in the court below, that the question concerning its shortage in orders for coal, raises an issue which requires arbitration. This contention was predicated upon a suggested ambiguity as to the meaning of the language in the contract requiring that the orders for coal, during the three to five-year period of the contract, be "in as nearly equal monthly instalments as is practicable" and "spread over such period * * * in as even a manner as is practicable" (R. 27).

Thus, appellee stressed the phrase "in as even a manner as practicable", and, failing to give due regard to the requirement that the orders be "in as nearly equal monthly instalments as is practicable", urged that it had a period of five years within which to take the specified quantity of coal. In this regard, appellee contended that it had the right to delay order-

ing and purchasing coal until the end of the five-year period.

Manifestly, this construction renders meaningless the provision that the coal be taken "in as nearly equal monthly instalments as is practicable". Giving appellee the benefit of the entire five-year period within which to order and purchase the specified quantity of coal, upon which theory the complaint proceeds, it would appear that appellee was obliged to take approximately 1250 gross tons of coal per month, during the five years.

We do not contend that appellee was obliged to take this exact quantity each month, but it is clear that this was a fixed average which appellee could not minimize substantially during the contract period, without placing itself in default. On this basis, it is undisputed that, at the time the present action was commenced, appellee's arrears aggregated 16,173 gross tons (R. 41). Over a five-year term, appellee, under the express requirements of the contract, was obliged to take approximately 31,250 gross tons, up to the time that this suit was instituted. Appellee, however, has ordered and purchased only approximately fifty per cent. of that quota. In the light of these circumstances, it is obvious that there has been a substantial breach, on the part of appellee, of the requirements of the contract.

If the words "in as nearly equal monthly instalments" are to be given any meaning, they must be interpreted to mean that appellee obliged itself to order and purchase, on the average, approximately 1250 gross tons per month. The provision in question, therefore, rebuts the contention that appellee could refrain from ordering and purchasing coal until a few days prior to the termination of the five-year period.

Were appellee's contention sustained, it would be possible for it to refuse to take in any coal during the first four years and eleven months of the contract period, and then seek to impose upon petitioner the obligation of delivering the entire 75,000 tons during the last month, or carrying petitioner's argument to its logical conclusion, on the last day of the term. It is incredible that the parties intended any such absurd and harsh result. It is well settled that a construction leading to a harsh or unreasonable result will be avoided (*Nicholson Transit Co.* v. *Nicholson, etc. S. S. Co.*, 43 F. [2d] 427, 433; *P. W. Brooks & Co.* v. *North Carolina, etc. Co.*, 37 F. [2d] 220, 223; cert. den. 281 U. S. 741; *Insurance Co.* v. *Concrete Steel Bridge Co.*, 37 F. [2d] 695, 702).

Appellee, having ordered and purchased only fifty per cent. of the contract requirements up to the time that suit was commenced, was clearly in default. Apart from the question of its default, it is uncontradicted that appellee repudiated the contract in December, 1932. Consequently, no legitimate dispute as to its liability for the failure to take the balance of the quota, is presented. The purported issues suggested by appellee, regarding its default and repudiation of the contract, are so palpably sham that they cannot be made the basis for arbitration.

In view of these circumstances, it is evident that petitioner's refusal to ship seven cars of coal, unless such shipment be accepted without prejudice to its rights, does not create an arbitrable dispute, inasmuch as an anticipatory breach had already occurred. Petitioner, therefore, was wholly within its rights in thereafter refusing to make any shipments unless the same were accepted without prejudice. If appellee's order were given in good faith, there was no good reason why it should refuse to accede to petitioner's request

that the shipment be accepted without prejudice to the latter's rights.

It was suggested, also, by appellee that its alleged desire to continue the contract, presented an arbitrable issue. This alleged issue was predicated upon its order for seven cars of coal, in January, 1933. After appellee's repudiation and breach of the contract, petitioner was not required to accept a belated gesture to continue with the contract. Petitioner had the right, upon the occurrence of the breach and repudiation, to take the position that performance of the contract on its part was no longer required and that it could maintain its suit for damages by reason of appellee's breach and repudiation. The latter's belated gesture, obviously made for the purpose of bolstering up its application for a stay, came too late to create an arbitrable issue.

The conclusion is irresistible that appellee breached and repudiated its contract, and, therefore, that there are no substantial or legitimate arbitrable disputes between the parties, concerning the performance of their agreement. Accordingly, the application for a stay should have been denied.

POINT III.

The amount of damage to which petitioner may be entitled by reason of appellee's default and repudiation, does not constitute an arbitrable issue.

As a result of appellee's breach and repudiation of the contract, the only issue that remains for determination is the amount of damage sustained by petitioner. The court below held that this issue alone would be enough to warrant arbitration, if the merits

were otherwise conceded (R. 79). We submit the court erred in its conclusion, first, because a mere assessment of damage, divorced from the determination of any other dispute or controversy between the parties, does not fall within the purview of arbitration, and, secondly, because the arbitration clause does not give the arbitrators power to assess the damage sought to be recovered by plaintiff.

1.

It would appear from the authorities that, where the only duty that arbitrators could perform, is the determination, assessment, or appraisal of damage, arbitration may not be had. The ascertainment or assessment of the damage sustained by a party, is merely incidental and collateral to the main controversy, and is in no wise determinative thereof. Hence, no controversy, within the meaning of the Arbitration Act is presented. The courts have uniformly held that provisions for the ascertainment or assessment of damage do not constitute enforcible arbitrable agreements.

An analogous situation was presented in *Matter of American Insurance Co.,* 208 App. Div. 168. In that case, an appeal was taken from an order directing that the controversy existing between the parties be arbitrated. The application for arbitration was based upon an appraisal clause contained in a policy of insurance. This clause provided that, in the event of disagreement as to the amount of loss or damage, the insured and insurer should each appoint an appraiser, and the appraisers so appointed should appoint an umpire, who, acting with the appraisers, should then determine the amount of loss or damage. In revers-

ing the order granting arbitration and denying the motion, the court said at page 170:

> "*A distinction, however, has invariably been observed between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is not conclusive as to the ultimate rights of the parties, except the mere matter of amount due, and the submission of all the matters that are in controversy between the parties for final determination upon the whole issue.* The distinction has been preserved because the submission of a collateral fact or of a particular question, without making the whole controversy the subject of the determination of arbitrators, is not deemed a coercive means designed to put an end to the controversy between the contentious parties." (Italics ours.)

And at page 171, the court concluded:

> "The Arbitration Law itself does not extend the hitherto recognized type of arbitration so as to include within its embracement appraisals of incidental matters which are at times provided for in contracts, * * *."

In *Toledo S. S. Co.* v. *Zenith Transportation Co.*, 184 Fed. 391, the court said at page 401:

> "It has been frequently decided that *an agreement to submit to the decision of others a question involving only calculation or appraisement or the fixing of values, and the like, * * * does not constitute an arbitration under the strict rules of the common law.*" (Italics ours.)

Other authorities to the same effect are:

Matter of Fletcher, 237 N. Y. 440, 447;
Matter of Webster v. *Van Allen,* 217 App. Div. 219;
Wurster v. *Armfield,* 175 N. Y. 256, 264;
Grody v. *Silverman,* 222 App. Div. 526, 527;
Williams v. *Ins. Co.,* 118 Misc. 799, 801.

The mere fact that a controversy may exist as to the amount of damage, does not transform an appraisal clause into an arbitration agreement (*Williams* v. *Ins. Co., supra,* 803). Similarly, the mere fact that a controversy may exist in the case at bar concerning the amount of damage to which petitioner is entitled, does not constitute such issue a basis for arbitration.

2.

Another circumstance impelling the conclusion that petitioner's damage does not constitute an arbitrable issue, is the fact that the arbitration clause does not give the arbitrators power to assess damages of the nature sought to be recovered by petitioner. The arbitrators, of course, may not go beyond the limits of the arbitration clause (*Matter of Kelley,* 240 N. Y. 74, 78).

In the case at bar, the jurisdiction of the arbitrators is limited to passing upon disputes as to the performance of the terms of the agreement (R. 31). Such provision, it has been held, does not permit arbitrators to pass upon a claim for special, or consequential, damage, such as claimed by petitioner, in the instant case.

The effect of an arbitration clause, similar in import to that involved in the case at bar, was considered in *Matter of Marchant* v. *Mead-Morrison M. Co.*, 252 N. Y. 284. A comparison of the two clauses will demonstrate their similarity.

Clause in Marchant Case.	*Clause in the Case at Bar.*
"If for any reason any controversy or difference of opinion shall arise as to the construction of the terms and conditions of this contract, *or as to its performance,* it is mutually agreed that the matter in dispute shall be settled by arbitration * * *."	"In case any dispute should arise between the buyer and the seller *as to the performance of any of the terms of this agreement,* such dispute shall be arbitrated * * *."

In the *Marchant* case the Appellate Division modified an award by the arbitrators, by striking out the damage item. The Appellate Division assigned as ground for its decision, that the arbitrators had power only to determine the fact of performance or nonperformance by one party or the other, and that there was no power to assess the damages resulting to the buyer's business by reason of the alleged breach of contract. The plaintiff appealed from this modification to the Court of Appeals. In sustaining the determination of the Appellate Division in so far as it struck out the award of damage, the Court of Appeals said, at page 299:

> "The clause to be interpreted is instinct with tokens of a purpose to encompass the submission with limitations and conditions. *It does not say that any and all controversies growing out of the contract shall be settled by*

arbitration, though the plaintiff would have us hold that its effect is nothing less. The submission is to be confined to controversies or differences of opinion as to 'the construction of the terms and conditions' of the contract, and controversies or differences as to the 'performance' of the contract." (Italics ours.)

And at page 300, the court continued as follows:

"*We think there was no intention to clothe the arbitrators with power to settle every difference having its genesis in the contract.* Their function was more modest. Questions might arise as to the meaning of the contract or the plans and specifications. The arbitrators were to give the answer. Questions might arise as to the performance of covenants and conditions where there was no doubt as to the meaning. Again the arbitrators would answer. If performance had failed in part, there would be questions very often as to the measure of the failure, which would lead to an inquiry as to the diminution in value of the subject-matter of the contract, the worth of what had been done when compared with that omitted. Here again we assume that the arbitrators were expected to estimate the deficiency, and if the price would overpay, to determine the abatement, as upon a claim for recoupment. Reparation *to that extent* would follow as an incident to the power that had been given them to declare the measure of performance.

They undertook to do much more. They did not limit themselves to fixing the value of what had been done as compared with that omitted according to the practice in recoupment (*Mondel* v. *Steel,* 8 M. & W. 858). They charged the dilatory seller with *consequential* damages of

nearly a million dollars on the ground that the effect of the delay was to plunge the buyer into ruin. The rule has long been settled that recoupment in its proper sense does not include a claim for damages purely consequential, but is limited to an allowance for diminution in the value of the subject-matter (*Mondel* v. *Steel, supra,* at pp. 870, 872; Williston on Contracts, Vol. 3, sec. 1464). We think this was the extent of the power of the arbitrators under the submission now before us." (Italics ours.)

And at page 302, the court said:

"*It is not a question whether the damages awarded proceed from the default so directly and certainly that the plaintiff might have recovered them if he had been suing in the courts. * * * It is rather a question whether the damages are of such a nature that arbitrators so commissioned may consider them at all.* One has only to compare this clause with sample clauses quoted in the briefs of counsel for the plaintiff to see how far it falls short of many standard forms that were readily available. Typical of such forms is that of the Chamber of Commerce of this State. It calls for arbitration of 'any dispute arising under, out of, or in connection with or in relation to this contract'. The parties to this controversy had no thought that they were saying the same thing." (Italics ours.)

And at page 303, the court added:

"Weighing these considerations in all their cumulative force, we are brought to the conclusion that the Appellate Division did not err in modifying the judgment by striking out the award of damages. It is a very easy thing for contracting parties to provide in a few words

> for a general arbitration if they are minded so to do. They are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

Under the foregoing ruling, it is evident that arbitrators, proceeding under an arbitration clause of the character presented in the instant case, at most could assess only *general* damages. It is clear, however, that the arbitrators, under such clause, lack the power to assess consequential, or special damage, of the nature sought by petitioner, in the instant case.

The situation presented in the case at bar, in so far as the question of damage is concerned, is similar to that involved in the *Marchant* case. Petitioner, in the instant case does not seek general damage. As a general proposition, it is well settled that the measure of damage for the anticipatory breach of a contract is the difference between the contract price and the cost of performance (*Roehm* v. *Horst,* 178 U. S. 1, 21; *U. S.* v. *Purcell Envelope Co.,* 249 U. S. 313, 320). In the instant case, petitioner seeks to recover as special, or consequential damages, commissions which it would have earned on the sale and delivery of the balance of the coal if appellee had abided by its agreement (R. 9). The arbitration clause here under consideration, is not broad enough to empower the arbitrators to assess damages of the nature sought by petitioner.

In the light of the foregoing authorities, it is clear that the assessment of damage, which is the only issue remaining for determination, cannot be the subject of arbitration. Since there were no other matters referable to arbitration, no basis existed for appellee's motion, and its application for a stay was properly denied by the District Court.

POINT IV.

Appellee waived and abandoned any rights which it possessed under the arbitration clause, by reason of its unreasonable delay and laches.

It is well settled that the right to arbitration may be waived or abandoned by laches, or other conduct inconsistent with an intention to arbitrate. In the instant case, it appears conclusively that appellee has been guilty of unreasonable delay in seeking to enforce its alleged rights under the arbitration clause.

Thus, although the question of appellee's default was called to its attention as early as the spring of 1932, appellee failed to request or compel arbitration, until in March, 1933 (R. 20), it made its present belated application, which was brought on only after petitioner had taken affirmative action. It appears further from appellee's moving papers that, even in January, 1933, its attention was called to petitioner's position concerning appellee's failure to order and purchase coal, in accordance with the provisions of the agreement (R. 23, 36-38). If appellee honestly believed that there existed any issue between the parties, referable to arbitration, it was incumbent upon it, at that time, to demand arbitration.

It appears further that, although again advised of petitioner's position and claims in April, 1933, when appellee's prior application for a stay was argued (R. 50-51), appellee failed to take any affirmative steps to demand or compel arbitration. If appellee actually desired arbitration, manifestly, it had ample opportunity to apply in the proper tribunal for that relief.

Appellee has alleged merely that it was ready and willing to arbitrate the alleged issues between

the parties, but nowhere in its moving papers does it claim that it demanded arbitration or selected an arbitrator. Appellee has been content to stand by idle, without making any effort to obtain arbitration. At no time did it seek to compel arbitration. Appellee requested merely a stay of proceedings until arbitration could be had. Apparently, appellee merely desired to stay petitioner from proceeding further and was content to let the situation remain in such indefinite state. If appellee's protestations that it has been ready and willing to arbitrate, were sincere, it would have long since moved to compel arbitration, and not merely to stay petitioner. It is significant that appellee took no affirmative steps until petitioner commenced this action.

Manifestly, appellee sought to use the Arbitration Act as a means of gaining delay. The court below should not have assisted appellee in accomplishing this object. It was aptly said in *Matter of Zimmerman* v. *Cohen*, 236 N. Y. 15, 20-21:

> "The Arbitration Law was passed to expedite and facilitate the settlement of disputes and overcome the delay caused by litigation. It was not intended that such law should be used as a means of furthering and extending that delay."

Appellee has been guilty of unreasonable delay and procrastination. The Arbitration Act may not be invoked by a party who has been guilty of laches.

In *Nagy* v. *Arcas Brass & Iron Co.*, 242 N. Y. 97, 98, the court said:

> "* * * unreasonable delay in making the proper application may justify a finding of waiver."

And at page 99, the court added:

> "But the Arbitration Law contemplates prompt action and too long a delay in seeking appropriate relief may be easily construed as an indication that this claim is waived."

See also:

> *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, aff'd. 186 N. Y. 611.

The court below held that a mere expression of willingness to submit to arbitration, was a sufficient answer to petitioner's objection that appellee was in default in proceeding with arbitration (R. 78). We submit that a rule which establishes such criterion, is erroneous. Under such rule, it would be possible for a defendant who had been guilty of inexcusable delay and laches to obtain an order staying proceedings, merely upon the bare assertion that he was ready and willing then to proceed with arbitration.

The Federal Arbitration Act (9 U. S. C. A., Sec. 3) provides that the court:

> "* * * shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Italics ours.)

Clearly, something more than a mere expression of willingness to arbitrate, belatedly made upon an application to obtain a stay, is required of the movant. The latter must adduce *facts* supporting the assertion of readiness and willingness to submit to arbitration. A bare assertion, unaccompanied by any substantiat-

ing facts, is insufficient. In the case at bar, appellee's conduct and actions—or lack of action—belie its assertion of willingness to submit to arbitration.

Both State and Federal Acts require that the party seeking arbitration, or a stay until arbitration is had, act promptly. To grant a stay in the case at bar, in view of appellee's unreasonable and unexplained delay, places a premium on delay in enforcing arbitration, thereby frustrating the purpose and intention of the Arbitration Law, which is to secure a speedy termination of a controversy. Appellee's unreasonable delay in seeking to compel arbitration, constituted a bar to its application for a stay.

POINT V.

The order of the Circuit Court should be reversed, and that of the District Court affirmed.

Respectfully submitted,

ALFRED B. NATHAN,
Counsel for Petitioner.

LOUIS H. MOOS,
BENJAMIN LEWIS,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

REPLY BRIEF FOR PETITIONER.

ALFRED B. NATHAN,
Counsel for Petitioner.

LOUIS H. MOOS,
BENJAMIN LEWIS,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Appellee.

REPLY BRIEF FOR PETITIONER.

Replying to Appellee's Point I.

A.

In view of appellee's failure to demand arbitration, the provisions of the arbitration clause did not bar plaintiff from bringing suit upon the contract.

Under its first point, and elsewhere in its brief, appellee urges that the bringing of this action is in itself a breach of the contract to arbitrate, and a deliberate evasion by petitioner of its promise to submit to arbitration. This contention is without merit. There is no proof in the record that appellee demanded arbitration, or took any affirmative steps towards arbitration, prior to the commencement of the present action.

Until appellee took some affirmative steps, indicative of a desire to arbitrate, petitioner was under no

obligation to submit to arbitration. It was no more the duty of petitioner than that of appellee to seek arbitration. The latter had ample opportunity to demand arbitration, if it had a genuine desire to arbitrate. In the absence of affirmative action by appellee calling for arbitration, the arbitration clause constituted no bar to an action by petitioner upon the contract.

In *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, affd. 186 N. Y. 611, the court, discussing an arbitration clause in the contract said:

> "* * * *the rule is well settled that such a clause is no defense to an action to recover upon a contract in the absence of evidence that before the commencement of the action the defendant took steps for the selection of arbitrators and to perform this arbitration agreement on its part.* As was said in *Smith* v. *Alker* (102 N. Y. 87), in speaking of a point made by the appellant that the dispute between the parties should have been submitted to arbitration under the clause in the contract, 'No evidence was given that the defendant took any steps for their selection. *It was not more the duty of the plaintiff than that of the defendant to do so.*' Certainly in the absence of evidence that the defendant insisted on its right to arbitrate or took some steps to carry out this agreement when the dispute between the parties arose, such a covenant is not a defense to an action to recover the amount due under the contract." (Italics ours.)

Provisions for arbitration, it is well settled, may be waived or abandoned by the agreement or action of the parties (*Matter of Zimmerman* v. *Cohen,* 236 N. Y. 15, 19; *Matter of Bauer-Co.,* 206 App. Div. 423, 426).

In the absence of a demand for arbitration, there is no presumption that either party to the contract desires to arbitrate. In the case at bar, assuming for the sake of argument that an arbitrable issue existed, petitioner was not barred from bringing suit, in view of appellee's failure to demand arbitration.

We find nothing to the contrary in the decision of *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 118, cited at page 16 of appellee's brief. In that case this Court adverted merely to the rule prevailing in New York prior to the enactment of the State Arbitration Act, that an agreement to arbitrate was legal, and damages were recoverable for a breach thereof, citing *Haggart* v. *Morgan*, 5 N. Y. 422. The *Haggart* case, however, sustains petitioner's contention that it was not barred from maintaining the present action. Thus, the court said in that case, at page 427:

> "The motion for a non suit was properly overruled. First, because the agreement to arbitrate only entitled the party to damages, *but was no bar to an action.*" (Italics ours.)

A similar rule prevails in the Federal Courts. In *Aktieselskabet etc.* v. *Rederiaktiebolaget Atlanten*, 250 Fed. 935, 937, affd. 252 U. S. 313, it was said:

> "It is, however, fair to assume from *Hamilton* v. *Home Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133, 134 L. Ed. 708, that an agreement like this, which leaves the disposition of the whole matter to arbitration is not a bar to an action in court, even if it may support an action for breach of the agreement. In such a case, when no arbitration has been

> actually begun and expenses incurred, only nominal damages could be recovered. *Munson* v. *Straits Dover SS Co.* (D. C.), 99 Fed. 787."

See also:

Lappe v. *Wilcox,* 14 F. (2d) 861, 862.

In effect, appellee contends that arbitration constitutes a condition precedent to the accrual of any right of action under the contract. The arbitration clause here under consideration, however, is not so framed. In order to bar suit, the clause must provide that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. Since the arbitration clause in the instant case, contains no such provisions, and in view of appellee's failure to demand arbitration, petitioner had an absolute right to bring suit, and in doing so it was not guilty of any evasion of its contract obligations (*Hamilton* v. *Home Ins. Co.,* 137 U. S. 370, 385; *Samuels* v. *Samis,* 124 Misc. 35, 37).

B.

The question of the exclusiveness of the forum and law specified in the arbitration clause, is properly before this Court.

At page 17 of its brief, appellee urges that petitioner's contention that since the parties selected the New York courts, no other court can recognize or give any effect to the arbitration clause, does not seem to be covered by petitioner's specification of errors. Petitioner's contention, however, as recognized by appellee, is inherent in petitioner's first specification

of error, that the court below erred in holding Sec. 3 of the U. S. Arbitration Act authorizes a stay pending arbitration, even though such arbitration must take place beyond the jurisdiction of the Federal Court, and under the law of a different forum (Petition for Writ, p. 16). Under the circumstances, petitioner's contentions concerning the exclusiveness of the forum and law specified in the arbitration clause, are properly before this Court.

C.

Section 3 of the Federal Arbitration Act cannot be considered apart from the other provisions of the Act.

Section 3 of the Federal Arbitration Act cannot be considered, or construed, apart from the other provisions of the Act, as appellee urges at pages 19 and 20 of its brief. Section 3 is an integral part of the Act, and its intent and meaning can be determined only by considering it in the light of the other provisions of the Act.

It is a well settled principle of statutory construction that the legislative intent is to be deduced from a view of the whole and every part of the Statute taken and compared together (*Jones* v. *York County,* 47 F. [2d] 837, 839; *Packard Motor Car Co.* v. *U. S.* 39 F. [2d] 991, 997, cert. den. 51 S. Ct. 27; *Ex Parte Public Nat. Bank,* 278 U. S. 101, 104; *The Metmugel,* 49 F. [2d] 368, 370, cert. den. 283 U. S. 866).

Viewing the Federal Arbitration Act as a whole and comparing the various parts thereof, it is evident that Section 3 was not intended to have a larger scope than Section 4, which is limited in application to agreements that call for arbitration within the jurisdiction of the Federal Courts.

Appellee concedes, at page 18 of its brief, that Section 4 is limited in application. In both Section 3 and Section 4 reference is made to an agreement in writing for arbitration, as furnishing a basis for invoking the court's aid. We are unable to perceive any distinction between the type of agreement referred to in Section 3 and that mentioned in Section 4. Nor is there any ground upon which a distinction can be based.

Since there is no distinction between the arbitration agreements referred to in these two sections, and in view of the fact that Section 4 concededly is limited in application, it follows that Section 3 is subject to the same limitation, and can be invoked only in the case of agreements calling for arbitration within the jurisdiction and under the control of the Federal Courts. As a necessary corollary it follows that a stay under Section 3 may not be granted where the agreement requires arbitration to proceed in another jurisdiction and under another law.

Manifestly, it would be an anomaly if the court, lacking the power to direct arbitration, were held to have power to grant a stay pending arbitration, which is merely an indirect method of enforcing arbitration. In *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 274, this Court said:

> "* * * it may be observed that section 3 provides for a stay in a pending suit until arbitration has been had in accordance with the terms of the agreement, and *it would be an anomaly if the court could grant such a stay and could not direct the arbitration to proceed* * * *" (Italics ours.)

In the case of an agreement calling for arbitra-

tion in a foreign jurisdiction, application for relief, whether to compel arbitration or obtain a stay, must be made to the tribunal designated by the parties. In *Gilbert* v. *Burnstine,* 255 N. Y. 348, where the parties had agreed to arbitrate at London pursuant to the Arbitration Law of Great Britain, the Court said at page 358:

> "We do say that there was an implied submission to the terms of the act itself, *and to any rules or procedural machinery adopted by competent authority in aid of its provisions.*" (Italics ours.)

A stay of proceedings pending arbitration is part of the procedural machinery established in aid of arbitration. An agreement to arbitrate in a designated forum manifestly constitutes a submission exclusively to the arbitration law of that forum and to the procedural machinery of such forum in aid of arbitration. Consequently, it is improper for any tribunal or forum other than that designated, to apply its procedural machinery at the request of a party who applies to it for relief in defiance of the agreement. Only the tribunal designated by the parties, is competent to grant relief. Hence, the Court below erred in granting appellee's motion for a stay.

Respectfully submitted,

ALFRED B. NATHAN,
Counsel for Petitioner.

LOUIS H. MOSS,
BENJAMIN LEWIS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1934

No. 211

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

against

WESTCHESTER SERVICE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENT

RALPH ROYALL,
ERNEST E. WHEELER,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

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No.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,
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against

WESTCHESTER SERVICE CORPORATION,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENT

I

THE OPINIONS OF THE COURTS BELOW

The Circuit Court of Appeals for the Second Circuit granted defendant's motion for a stay pending arbitration, reversing the order of the District Court for the Southern District of New York, with an opinion which is reported in 70 F. (2d) 297, and which appears at page 73 of the record.

The District Court rendered an opinion, which is not officially reported. This opinion is printed in the record (R. 61).

II

JURISDICTION

1

The jurisdiction of this Court is based upon Judicial Code, Section 240a, as amended by the act of February 13, 1925 (28 U. S. C. A. 347).

2

The order of the Circuit Court of Appeals for the Second Circuit was entered on the 23rd day of April, 1934.

3

The jurisdiction in the District Court was based on the diversity of citizenship.

ARGUMENT

POINT I

THE CIRCUIT COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The decision of the Circuit Court of Appeals in this case is the first decision by a Circuit Court of Appeals construing Section 3 of the Federal Arbitration Act. The Court held that assuming (but not deciding) the parties to the contract had expressly selected another jurisdiction and statute for the enforcement of the arbitration clause, the Federal court should nevertheless grant a stay pending such arbitration.

The case of *California Prune & Apricot Growers' Ass'n* v. *Catz American Co.,* (C. C. A. 9th 1932) 60 F. (2d) 788, relied upon by the petitioner and the District Court was a special proceeding brought upon the petition of one of the parties to an agreement for an order directing the parties to the contract to proceed to an arbitration. The petitioner in that case relied upon the California Arbitration Statute and the special remedial provisions of that Statute empowering the courts to entertain petitions for the specific performance of arbitrations. The gravamen of the decision was simply this—that the California Statute did not purport to authorize the Federal court to exercise this peculiar and special power and that the California legislature would not have had the power to do so if it had tried.

Certainly the Court of Appeals of the 9th Circuit cannot be said to be in disagreement with the decision of the court below. This is demonstrated by the fact that the Circuit Court of Appeals for the 9th Circuit in the case of *Pacific Indemnity Co.* v. *Insurance Company of North America,* (C. C. A. 9th 1928) 25 F. (2d) 930, granted, as did the Court in the instant case, a stay upon the application of a defendant, where the suit was brought in defiance and disregard of an arbitration clause enforceable under the California Arbitration Statute. This conclusion was reached although the Federal Arbitration Act did not apply.

In neither of these cases was the Federal Arbitration Act before the Court.

POINT II

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS, NOR HAS IT DECIDED AN IMPORTANT QUESTION OF GENERAL LAW IN A WAY PROBABLY UNTENABLE OR IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Petitioner places reliance on *Gilbert* v. *Burnstine,* (1931) 255 N. Y. 348. Except as authority for respondent, this case seems to us to have no bearing on the question decided below. It sustained a cause of action upon a British arbitration award and indicates that the New York Court of Appeals will compel a reluctant party to an arbitration clause in a contract, to abide by the provi-

sion even where the arbitration proceedings were contemplated to be held beyond the jurisdiction of the United States. We refer particularly to the quotation from this case on pages 20 and 21 of the petitioner's brief, as we believe it applies with full force to the attempt of petitioner to nullify the arbitration clause by bringing suit in the Federal court.

A motion for the stay of the trial of the action begun against us in the Federal court was not a seeking by us of the forum of the Federal court. We were brought there by the plaintiff involuntarily and in defiance of an agreement. To hold that the mention of one jurisdiction in this agreement would leave either party free to ignore the agreement in another jurisdiction, where the agreement is also valid and irrevocable, nullifies the agreement and makes it meaningless. It could hardly have been the intention of the parties to add the words to the arbitration clause "but either party may avoid arbitration by bringing suit in the Federal court."

The decision below is in complete harmony with the opinion in *Matter of Inter-Ocean Food Products Inc.,* (1923) 206 App. Div. 426. In that case the Court indicated that the proper remedy of a party to a contract containing a foreign arbitration clause was a stay in any action brought upon the contract in New York.

There seem to be no other New York cases bearing upon the question decided below.

The Circuit Court of Appeals apparently deemed there was a conflict in the Federal District Courts. The following cases were relied upon by the petitioner and the District Court: *The Silverbrook,* (D. C. 1927) 18 F.

(2d) 144; *The Fredensbro,* (D. C. 1927) 18 F. (2d) 983, and *The Beechwood,* (D. C. 1929) 35 F. (2d) 41.

These cases were in a different field. They were admiralty actions on contracts of affreightment which contained the usual London arbitration clause. In the *Silverbrook* and *Beechwood* cases the courts held that while Section 2 of the Federal Act was broad enough to validate such arbitration agreements, the other provisions of the Act having to do with procedure and enforcement in the Federal courts, negatived any such broad application and that an agreement taking the arbitration procedure and enforcement to a foreign country was not intended to be validated.

In the *Fredensbro* case the defendant pleaded as an exception to the jurisdiction of the Court the London Arbitration Clause in the Charter party. The Court retained jurisdiction of the libel, remarking that either party might avail itself in the suit of the arbitration clause in accordance with the United States Arbitration Act.

Directly contra and supporting respondent's view is *Danielsen* v. *Entre Rios Rys. Co.,* (D. C. 1927) 22 F. (2d) 326.

So in the case of *The Volsinio,* (D. C. 1929) 32 F. (2d) 357, the Court expressly disagrees with the decision on this point in the *Silverbrook* case.

Whether or not there is a conflict in the District Courts on the question presented in the instant case, the decision below is not in conflict with the weight of authority within the meaning of the Rules of this Court.

POINT III

THE CIRCUIT COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. THERE IS NO QUESTION INVOLVING SPECIFIC PERFORMANCE BEFORE THIS COURT.

The question of enforcement of the arbitration clause by the Federal court is not involved in this case. The Federal Arbitration Act provides that an arbitration clause is valid and irrevocable. The petitioner has brought suit in the Federal court in violation of the arbitration clause in the contract. Respondent has simply, in accordance with the Federal Arbitration Act, asked for a stay of the litigation pending arbitration. Neither of the parties to this agreement have petitioned the Federal court for an order directing that arbitration should proceed. Only until this step is taken, would it be appropriate to determine whether the parties have in their agreement sought the sanction of another jurisdiction, and it would then become the problem of the moving party to proceed in a court having jurisdiction of specific performance.

The question as to whether the Federal courts have or have not this jurisdiction, is not involved in the issues of this case, and is therefore not now before the Supreme Court for determination.

POINT IV

THE SPECIFICATION OF ERRORS CITED BY THE PETITIONER DO NOT INVOLVE IMPORTANT QUESTIONS OF GENERAL LAW.

We submit that the numerous specifications of errors as to whether or not the respondent was in default in proceeding with arbitration, or upon whose shoulders the initiative rested to institute arbitration proceedings, or as to who should name the first arbitrator, or who repudiated the contract, or as to whether or not there was present an arbitrable issue, or as to whether the assessment of plaintiff's damages constituted an arbitrable issue, are trivial in their nature in so far as invoking the attention of the Supreme Court is concerned. These questions have been determined by the Circuit Court of Appeals in its opinion and their importance is limited to the parties involved.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

RALPH ROYALL,
ERNEST E. WHEELER,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

against

WESTCHESTER SERVICE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DEFENDANT BELOW, RESPONDENT IN THIS COURT

ERNEST E. WHEELER,
RALPH ROYALL,
W. CHANTLER ARBUCKLE,
BARTOW H. HALL,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE, *Petitioner,* *against* WESTCHESTER SERVICE CORPORATION.	No. 211

BRIEF ON BEHALF OF THE DEFENDANT BELOW, RESPONDENT IN THIS COURT

Statement

The petitioner on writ of certiorari, seeks to review an order of the Circuit Court of Appeals for the Second Circuit, granting the defendant's motion for a stay of the action pending arbitration and reversing an order of the District Court for the Southern District of New York denying the stay. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 297 and is printed at pages 73-80 of the record. The opinion of the District Court is not officially reported and is printed in the record at pages 61-63.

The respondent before answering moved for a stay pending arbitration (R., 19-20) which motion Judge Bondy denied with leave to renew, on the ground that it was premature (R., 17-18).

The defendant served its answer on the 27th day of July, 1933, and thereafter renewed its motion for a stay pending arbitration upon the pleadings (R., 3-14) and upon the affidavits and papers submitted upon the former motion for the same relief, and upon an affidavit setting forth the proceedings already had (R., 15-40). This motion came on to be heard simultaneously with a motion by plaintiff to strike out the second separate defense which pleaded the arbitration agreement (R., 17-18).

The second cause of action (R., 7-10), to which this appeal alone refers[1] and which we will hereinafter describe as the complaint, is based upon a written agreement, not, however, attached or pleaded *in haec verba.* The agreement forms part of the moving papers and is printed in full (R., 26-32). The arbitration clause in this agreement (R., 31), and upon which the motion for a stay is based, is as follows:

> "TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in ac-

[1]The first cause of action was dismissed by the District Court on July 18th, 1933. The order of dismissal was affirmed by the Circuit Court of Appeals without opinion and a writ of certiorari denied. (No. 101 October Term, 1934).

> cordance with the arbitration laws of the State of New York."

Judge Woolsey denied the motion for a stay (R., 61-63) on the ground that the foregoing clause, although "somewhat inartistically worded" is an arbitration agreement between the parties to be enforced by the New York State Courts under the New York State Arbitration Statute. He also held that such an agreement does not constitute a defense to an action brought in the Federal courts and granted plaintiff's motion to strike out the Second defense which pleaded the arbitration clause.

Judge Woolsey hazarded the suggestion (R., 63) that the New York State courts might under the New York Act, include an injunction or stay against proceeding with litigation in any other form—whether federal, state or foreign.

The Circuit Court of Appeals in reversing the District Court expressly refrained from construing the arbitration clause in the agreement as to whether the language employed, exclusively selected the New York Statute and Courts for the enforcement of the agreement to arbitrate. That court said:

> "We do not find it necessary to decide whether the arbitration clause at bar was limited to a proceeding in the state court. While it is certainly possible to read the language only as an addition, redundant because already provided by law, and as not intended to prevent arbitration elsewhere, we are content to treat it as exclusive, as the judge did" (R., 75).

Thus assuming, but not deciding, that the parties had exclusively selected the New York forum and law, the court granted the stay under Section 3 of the Federal Act.

The action is for damages for an alleged breach of a written contract (R., 26-32) between the plaintiff (Seller) and the defendant (Buyer) for the shipment and delivery of 75,000 gross tons of coal over a period of not less than three nor more than five years. The shipment was from Pennsylvania to Yonkers, New York (R., 27, 78), and therefore had to do with commerce between the States (Opinion; R., 77).

The contract was made on the 22nd day of January, 1931 (R., 26), and at the time of the commencement of this action, February 23, 1933 (R., 2), had about three years still to run. Although the contract is directly with the seller the damages are for prospective loss of *commissions* for the whole 75,000 tons less the amount already delivered (R., 9). No fixed price for this coal is set in the contract. The price is the "Seller's circular prices at the time of shipment," but not higher than the average circular prices of three coal companies named in the contract (R., 28-29).

On the 3rd of January, 1933, the defendant gave an order under the contract for the shipment of seven cars of coal (R., 22). The petitioner refused to fill this order (R., 36), except on condition that the acceptance of the order would not be deemed a waiver of any rights the petitioner had at that time. This refusal was shortly followed by a letter to respondent from petitioner's attorneys dated January 10, 1933 (R., 37-38). Further conversations followed (Affidavit of Elkind; R., 39-40), and on February 23rd, in disregard of the arbitration clause in the agreement, petitioner began this action. The respondent then made its first motion for a stay (Supporting affidavits, verified March 24, 1933; R., 25 and 40), which was denied as premature.

It thus appears that the petitioner has ignored the provisions of the agreement for arbitration by bringing an action, has brought the action in the Federal court, and now claims that the State courts, under the agreement, have exclusive jurisdiction to enforce the arbitration clause and that the Federal courts are powerless even to grant a stay pending arbitration.

The language employed in the Federal and New York arbitration acts is almost identical. The United States Arbitration Act contains the following provision:

> "Sec. 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration" (9 U. S. C. A. §3).

The Arbitration Law of the State of New York contains the following provision:

> "Sec. 5. STAY OF PROCEEDINGS BROUGHT IN VIOLATION OF AN ARBITRATION AGREEMENT OR SUBMISSION. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or

under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement" (L. 1920, Ch. 275; McKinney's Cons. Laws of N. Y., Book 3-A).

Summary of Argument

Preliminary. **Review of the cases construing the Federal, New York and English Arbitration Statutes, whether for or against the respondent's contentions, with particular reference to cases dealing with foreign arbitration clauses.**

Point I. **Even assuming that the arbitration clause of the agreement is exclusive, the stay was properly granted under Sec. 3 of the Federal Act.**

a. The granting of a stay would not be in disregard of the arbitration clause, but would make it effectual.

b. The language of Sec. 3 is comprehensive and clear and brings within its scope arbitration contracts whether or not they specify a particular place or law for the arbitration.

It may and should logically be applied without reference to the succeeding section of the Act providing for summary proceedings ordering arbitration.

If the decision of this case requires a construction of Section 4 of the Act, no practical difficulties of consequence arise in applying it to the facts in this case, and ordering arbitration under the contract.

Point II. **The language of the arbitration clause in the agreement does not warrant the construction that the parties selected the New York courts and statute to the exclusion of any action by the Federal courts.**

The language is merely permissive.

It should be construed with reference to the dominant intention of the parties, namely, to arbitrate.

It should be strictly construed as against a finding of intent to discriminate between Federal and State courts.

Point III. **As to petitioner's Specification of Errors 3 to 11, both inclusive (Petitioner's Brief, Points II, III and IV), the respondent rests upon the citations and reasoning in the opinion by the Circuit Court of Appeals.**

An arbitrable issue is presented.

The controversy lies within the provisions of the arbitration clause of the contract.

The respondent is not in default in proceeding with arbitration or guilty of any laches.

Argument

Decisions of the Federal Courts Construing the Federal Arbitration Act

The Federal Arbitration Act was passed in 1925. Section 15 of the Act provides that it shall not apply to contracts made prior to January 1, 1926. The act as to its general scope and purpose has been considered by this Court in an opinion by the Chief Justice, and its constitutionality upheld in *Marine Transit Corporation* v. *Dreyfus,* 284 U. S. 263; 76 L. Ed. 282. Its applicability to contracts providing for arbitration in a foreign jurisdiction has been construed in the lower courts. All of such cases had to do with arbitration clauses in charter parties calling for arbitration in London under the English law and were in Admiralty. No case has been found construing the Act where the contract called for arbitration under a State law to the exclusion of the Federal courts. It may be said in passing that such discrimination between the State

and Federal courts is abhorrent (Restatement of the Law of Contracts, American Law Institute, Vol. 2, p. 1064, Sec. 558) and that contracts should not be so construed unless such construction is inescapable.

These decisions of the lower courts are as follows:

The Silverbrook, 18 F. (2d) 144, D. C. Eastern District of Louisiana, 1927;

The Fredensbro, 18 F. (2d) 983, D. C. District of Pennsylvania, 1927;

The Beechwood, 35 F. (2d) 41, D. C. Southern District of New York, 1929;

Danielsen v. *Entre Rios Rys. Co.,* 22 F. (2d) 326, D. C. District of Maryland, 1927;

The Volsinio, 32 F. (2d) 357, D. C. Eastern District of New York, 1929.

In the *Silverbrook,* the charter party contained a London arbitration clause. One of the parties to the agreement brought suit *in rem,* and the respondent moved for *a stay* under Section 3 of the Federal Act. The court construed the Act to the effect that the sections other than Section 3 indicated the intention of the Congress to confine the operation of the whole Act to cases where specific performance of arbitration could be had "within the legitimate bounds of the territorial jurisdiction" (p. 147), of the Federal courts.

In the *Fredensbro,* the suit was one *in personam* and *in rem* by a British corporation against a steamship attached within the court's jurisdiction and a Danish corporation, the owner, held within the court's jurisdiction. The charter party contained a London arbitration clause. This arbitration clause *was pleaded as an exception to the jurisdiction of the court.* The court overruled the exception retaining jurisdiction, but saying (p. 985):

> "In view of the fact that the *res* is within the jurisdiction of the court, that the witnesses are within the jurisdiction, *that either party may avail itself in the suit of the arbitration clause in accordance with the United States Arbitration Act,* I fail to see any sound reason why the court should not take jurisdiction." (Italics ours.)

This would seem to be authority in our favor, because the court while retaining jurisdiction, (there was no application for a stay) leaves either party free to proceed under the United States Arbitration Act.

In *The Beechwood,* the charter party contained a London arbitration clause. Answering this action *in rem* the defendant pleaded the arbitration clause and moved to dismiss the suit. Judge Caffey struck out the defenses and refused dismissal on the ground that although the language of Section 2 of the Act (the validating clause) was broad enough to cover arbitration in London, the other sections providing for specific performance indicated that the Act was not intended to cover contracts calling for arbitration beyond the forum of the United States courts.

In *Danielsen* v. *Entre Rios Rys. Co.,* the suit was a libel *in personam* and the charter party contained a London arbitration clause. The respondent filed *exceptions to the jurisdiction* of the court, pleading the foreign arbitration clause. The court overruled the exceptions sustaining the jurisdiction of the court, but holding that a stay would be granted if applied for. Judge Coleman made a full analysis of the Federal Act, expressly disagreeing with the reasoning in the *Silverbrook* case, where a stay was denied, but agreeing with the opinion of the District Judge in the *Fredensbro* case. The court said (pp. 327-328):

"The effect of the act then seems to be that it requires the courts to stay trial, upon motion of one of the parties, until arbitration is had, and to order arbitration if, as provided in section 4, 'the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.' In other words, there is nothing in the Act which indicates that, although the arbitration provided for may be beyond the jurisdiction of the court, this shall forestall or in any way curtail jurisdiction which the court would normally have of maritime suits. On the contrary, as is seen from the language of the sections of the act above quoted, it is contemplated that the proceedings may be brought in the usual manner and jurisdiction over the arbitration assumed if the arbitration provided for is to take place within the court's jurisdiction; if not, then the proceedings shall be stayed until the foreign arbitration is perfected, whereupon the court has power to enter a decree upon the award. That is to say, the only limitation imposed upon the court is a stay pending the perfection of what cannot be accomplished within the jurisdiction of the court, and such a stay is to be clearly distinguished from prohibition against assumption of jurisdiction in the first instance.

This construction seems to be further borne out by the fact that the express purpose of the act is to deal with disputes in matters not merely of domestic, but of foreign, business, commerce 'with foreign nations,' which implies that the incident of such commerce which the act validates—that is arbitration—may occur in foreign places."

In *The Volsinio,* the proceeding was *in rem,* the charter party calling for arbitration in London. The contract had

to do with commerce between *two foreign nations.* The respondent applied for a stay under Section 3 of the Federal Act. Although the court denied the stay on the ground that commerce between two foreign states was not "commerce" as defined in the Arbitration Act, the Judge expressly disagreed with the decision in the *Silverbrook* case which, like *The Beechwood,* held that the Act did not validate contracts for arbitration outside the United States and agreed with the decision in *Danielsen* v. *Entre Rios Rys. Co.* The court held that it would have granted a stay although the charter party called for foreign arbitration, had the charter party concerned commerce between the United States and a foreign country, rather than commerce between two foreign countries.

Decisions Construing the New York Arbitration Act in Contracts Calling for Arbitration Outside New York

The New York Act became a law in 1920. Its constitutionality was upheld by this court in *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109 (68 L. Ed. 586) (1923), Judge Brandeis writing the opinion. The Federal statute enacted five years later employs almost identical language.

The New York Court of Appeals has not passed upon the application of the section of the statute providing for a stay where the contract called for arbitration outside the State, but the question has been before the lower courts.

The Court of Appeals, however, in *Matter of Marchant* v. *Mead-Morrison Mfg. Co.,* 252 N. Y. 284 (1929), in reviewing orders to arbitrate and appointing a third arbitrator, considered the general purpose and intent of the act, with some reference to contracts calling for arbitration in a particular locality outside the State. The arbitration

clause in question was construed as containing no implication of such exclusive selections of another law or place.

In *Lappe* v. *Wilcox*, 14 Fed. (2d) 861, District Court, N. D. New York, September 30, 1926, Judge Cooper refused to grant a stay under Section 5 of the New York Act, basing his decision on the ground that the statutes of the State of New York did not affect non-residents of the State who have the right denied to inhabitants of the State to invoke the jurisdiction of the Federal court. He held that the New York statute had the effect of impairing the rights and remedies of non-resident suitors entitled to resort to the Federal courts for redress, and that it was therefore ineffective as to such non-resident suitors. The Federal statute was not referred to. The contract in that case had been made long before the Federal statute was passed.

In *Matter of Inter-Ocean Food Products, Inc.*, 206 App. Div. 426, First Dept., 1923, there was an original application (no suit was pending) to compel one of the parties to a contract to arbitrate in California as provided in a clause of the agreement in controversy. The lower court entered a decree directing the parties to arbitrate in California in accordance with their agreement. After reviewing the English cases and construing them to hold that under the English Act a stay would be granted in a suit involving a foreign arbitration clause, the Appellate Division reversed the court below, denying specific performance of the contract. The appellate court held, however, that in a suit upon the contract a stay would be granted under the New York Act, saying at page 433:

> "I am of the opinion that while an agreement to arbitrate in a foreign jurisdiction and before a foreign arbitrator, is not invalid or illegal, it cannot

> be enforced as between citizens of this state who are parties thereto by compelling them to go without the state in a foreign jurisdiction and before a foreign tribunal there to arbitrate their disputes. I am also of the opinion that the only remedy available under such circumstances in the courts of this state, is to stay the trial of an action here by the party who has refused to carry out the agreement to arbitrate and who seeks the aid of our courts to enforce his claim therein. Such a stay may clearly be given under the provisions of Section 5 of the Arbitration Law."

In *Kelvin Engineering Company Inc.* v. *Alfredo Blanco and others,* 125 Misc. 728, 1925, a suit had been brought to recover damages in the sum of $700,000 upon a contract containing a clause as follows:

> "The parties hereto submit themselves to the courts of the City of San Diego, Cuba, whether on questions relating to performance or non-performance of this contract, expressly renouncing their right to litigate in any other place" (p. 731).

The court said at page 731:

> "Unquestionably this court cannot direct parties to proceed to submit their controversy to the courts of another jurisdiction but it may by virtue of Section 5 of the Arbitration Act, stay the trial in this forum until such arbitration has been had in accordance with the terms of the agreement." Citing *Matter of Inter-Ocean Food Products, Inc., supra,* and, *Mittenthal* v. *Mascagni,* 183 Mass. 19.)

Referring to the English and Massachusetts authorities, the court said (p. 733):

> "I am in accord with these views. It would be too strict and narrow a limitation of the intention of the parties expressed to hold that an agreement to submit to courts of foreign jurisdiction should not be treated as a submission to arbitration within the purview of the Arbitration Law."

The stay was granted.

In *Matter of Hamburg-American Line,* 135 Misc. (N. Y.) 715, 1930, affirmed without opinion, 228 A. D. 802, however, the court of first instance expressly disagreed with the *Kelvin* case, declining to grant a stay where the contract sued upon contained a provision that all disputes were to be decided according to the German law in the Hamburg courts. The *Inter-Ocean Food Products Co.* case was not referred to in the only opinion rendered—that in the lower court.

Decisions of the English Courts Construing the English Act Where the Contract Called for Arbitration Outside the Jurisdiction of the British Courts

It appears that under the English Act, the word "submission" is used to describe clauses in commercial contracts calling for the arbitration of future disputes arising thereunder. While the phraseology of the Act (passed in 1889) is somewhat different from that used in the Federal and New York Acts, the substance and the procedure is substantially the same. The Arbitration Act of 1889 (52 and 53 Vict. C. 49) Section 1, provides:

> "Submission unless contrary intention is expressed therein shall be irrevocable * * * and shall have the same effect in all respects as if it had been made an order of the court."

Section 4 corresponding to Section 3 of the Federal Arbitration Act and Section 5 of the New York Act, provides as follows:

> "If any party to a submission * * * commences any legal proceedings in any court * * * any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay proceedings * * *."

The Act contains no specific provision for an order directing arbitration. The "submission", that is the agreement to arbitrate, is declared to "have the same effect in all respects as if it had been made an order of the Court."

In *Law* v. *Garrett*, L. R. 8 Ch. Div. 26 (C. A. 1878) the parties had agreed in their contract to refer all disputes to the St. Petersburg Commercial Court or its successor. The plaintiff sued in England and the defendant moved for a stay, pleading the arbitration clause of the contract. The court granted the stay, holding that courts have a *prima facie* duty to support an agreement to arbitrate. The decision was before the passage of the arbitration act but the English Common Law Procedure Act conferred upon the court the power to stay proceedings upon being satisfied that no reason existed for not referring a matter to arbitration.

In the following cases the courts granted a stay under Section 4 of the English Act where actions had been brought on contracts containing clauses providing for arbitration abroad or for the submission of all controversies to foreign courts. *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Limited*, L. R. (1903), 1 K. B. 249 (Court of Appeal); *Kirchner* v. *Graban*,

(1909) 1 Ch. Div. 413; *The Cap Blanco,* (1913) Pr. Div. 130 (Court of Appeal).

POINT I

Even assuming that the arbitration clause of the agreement is exclusive, the stay was properly granted.

(a). *The granting of a stay would not be in disregard of the arbitration clause, but would make it effectual.*

The position of the petitioner comes to this: It claims to have exclusively selected the New York statute and laws for the sanction and enforcement of the arbitration clause. In derogation of its general agreement to arbitrate, it brings an action for breach of the contract, selecting the Federal court for that purpose. The bringing of the action is in itself a breach of the contract to arbitrate. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109 (68 L. Ed. 582) (1924); citing *Haggart* v. *Morgan,* 5 N. Y. 422, 427; 55 Am. Dec. 350. Having brought the defendant into the Federal court (in itself a breach of the contract and certainly contrary to its own claim that it has selected the New York courts for the settlement of any controversy arising out of the performance of the contract), it now insists that the Federal court has no power to give effect of any kind to the agreement it has made. Such deliberate evasion of its own promise it supports by contending that to grant a stay would be to make a new contract for the parties because it could only be granted under the Federal Act, and the parties have exclusively adopted

the New York statute and none other. As part of this contention is the further idea (inherent) that since the parties have selected the New York courts, no other court can recognize or give any effect to the arbitration clause. Even the granting of a stay would, petitioner claims, be making a new contract for the parties.

The Circuit Court of Appeals did not discuss this contention. It does not seem to be covered by petitioner's specification of errors (Petition for writ, pp. 16-17) but is argued at length in petitioner's brief.

It seems to us that exactly the contrary is true. Assuming the narrow interpretation of this clause asserted by the petitioner, all the Federal court is asked to do is to step aside and permit the parties to carry out the agreement to arbitrate under the supervision of the New York courts,—an agreement which the petitioner insists it made, but now wishes to avoid. This would not be making a new agreement for the parties. The granting of a stay would give effect to the agreement which petitioner insists the parties have validly made.

The petitioner further contends that Section 3 of the Federal Arbitration Act, 9 U. S. C. A. (United States Arbitration Act § 3) does not authorize a stay where the arbitration must take place beyond the jurisdiction of the Federal court and under the law of a different forum (Petition for writ, p. 16; Pet. brief, p. 17).

(b) *The provisions of the Act are clear and cover the instant case.*

Section 3 of the Act is as follows:

> "Sec. 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION. If any suit

> or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration (Feb. 12, 1925, c. 213, Sec. 3, 43 Stat. 883)."

This is broad language and clearly covers the case. The only question is whether or not the construction of the statute as a whole requires a narrow construction of Section 3.

The judicial functions under the Act are two-fold: (1) the granting of stays under Section 3 where suits are brought under agreements in derogation of an arbitration clause which is a part of the agreement; and (2) the entertaining by the court of a new kind of special summary proceeding, viz.: a proceeding brought for the specific performance of an agreement to arbitrate.

There may be inherent in the subject matter of the latter proceeding practical difficulties which confine such proceeding to a limited field, and to that extent compel a narrower construction as to the scope of that part of the Act. This presents the question of whether or not this limited view must be taken as to the scope of the provision which directs the granting of the stay. We believe that it does not.

The provision of Section 3 relating to the stay constitutes no new grant of judicial power. No doubt the courts,

as a part of their inherent power to control suits which are pending before them, have always had the discretionary power to grant stays. The judicial doctrine that a stay would not be granted for the reason that the suit was brought in derogation of agreements to arbitrate did not rest upon a question of lack of power to do so. Such doctrine rested upon the judicial conception of policy that parties by their agreements should not foreclose their right of recourse to the courts.

The act of Congress in passing the Arbitration Act and especially Section 3 thereof is in this respect a declaration of a new policy to be followed by the courts. Even if the judicial power had not always been inherent in the court to grant stays, the power of Congress under the Constitution to constitute the Federal courts and define their jurisdictional powers, would clearly authorize Congress either by an amendment of the Judiciary Act or in the form of the Arbitration Act to empower the courts to do so, and as above indicated there is no room for the conception that the courts could not in any suit pending before the court grant a stay.

If Congress had merely adopted Section 3 without as a part of the same Act authorizing the special proceeding for the specific enforcement of arbitration agreements, there would not be the least room for the argument that Section 3 was limited in its scope. We submit that the fact that the other part of the Act authorizing the summary special proceeding for specific performance may have to be confined to a narrower field is no reason for narrowing the construction of Section 3.

It is apparent from the opinion of the Circuit Court of Appeals that that court had in mind practical considerations and also the language of the Act which might require

the provision as to specific performance to be applied in a narrower field. The court, in construing Section 3 and giving it a broad application, treated Section 3 as a thing apart from the other part of the statute, and we submit that the court was quite correct in doing so.

If the decision of the case should require it, we think that the court below could have gone farther and could have held in the instant case that the provision to arbitrate could be specifically enforced in the Federal court. We say this still assuming that the arbitration clause is exclusive.

The cases which have held that courts would not enforce agreements for a foreign arbitration have rested their determination primarily upon the following language contained in Section 4 of the Act:

> "The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed."

Professor Sturges in his book entitled "Commercial Arbitration and Awards", at page 934, discusses the meaning of these words, with relation to their context.

He observes that to construe these words as disabling the Courts from ordering foreign arbitration, nullifies two distinct provisions of the same section, namely that the orders provided for therein shall direct the parties to proceed to arbitration *in accordance with the terms of the agreement.* He deems it more reasonable to take the sentence as intended to mean that the proceeding shall be within the district in which the petition is filed, when the arbitration agreement does not specify any particular place where the arbitration shall be held.

We are not unmindful that practical difficulties may seem to exist in specifically enforcing an agreement for

foreign arbitration, but we believe that these difficulties are not as real as they may seem to be.

An order specifically directing the parties to arbitrate primarily determines that there is an arbitration clause in the agreement which is entitled to judicial recognition as an obligation, and that one of the parties is in default in proceeding under it. In a word, it adjudicates a status. If, after such an order to proceed to arbitration in respect of a clause in the agreement to have the arbitration, for example, in London, the party obtaining the order should proceed before London arbitrators and take his award in default of the other party's submission, there would seem to be no difficulty in the giving effect to that award by this court to the same extent as if it were under an arbitration proceeded upon here. While the courts speak of the practical difficulties surrounding "supervision" by the court under such circumstances, the difficulty may be again overstated, for it is hard to see just wherein the necessity for supervision lies.

In the instant case, however, none of these difficulties, however real they may be, can apply. In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (68 L. ed. 582), Judge Brandeis said:

> "The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation."

As a matter of substantive law such an agreement is entitled to recognition as a legal obligation implying complementary legal rights. Since the only questions remaining are questions concerning procedure and since the procedural rights under the New York statute and under the Federal

statute are virtually identical, the procedural difficulties would seem to disappear.

Even giving to the language of Section 4 above quoted its narrowest construction, it would only mean that the power of the court to act is restricted to cases in which the arbitration hearings were to be held within the territorial jurisdiction of the court. Giving also to the arbitration clause of the agreement the narrowest construction, that agreement contemplates that the arbitration hearings may be held within the territorial jurisdiction of the United States District Court for the Southern District of New York and there is no procedural difficulty or practical difficulty involved. The Federal court, acting within the narrowest construction of the statute, may do as well as the New York court in selecting arbitrators if such selection be necessary and in supervising the conduct of the arbitration.

Whatever the limitations upon the exercise of the power conferred by the statute upon the courts to enforce specifically the arbitration clause, we submit again that they constitute no limitation upon the power of the court to grant a stay or the court's duty to follow the direction of the Act in granting a stay where suit has been brought in that court in derogation of the arbitration clause.

The petitioner invoked the jurisdiction of the United States District Court by bringing this suit in that court in derogation and violation of the agreement to arbitrate. The petitioner claims that, notwithstanding that he has thus invoked the jurisdiction of this court, the parties have exclusively chosen the New York court. We submit that, having come into the Federal court, the petitioner must submit to the Federal law and that the defendant is entitled

as a clear matter of right to the stay which the Act of Congress directs the Federal courts to grant under such circumstances.

POINT II

The language of the arbitration clause in the agreement does not warrant the construction that the parties selected the New York courts and statute to the exclusion of any action by the Federal courts.

The clause is as follows:

> "TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

The language is permissive. It describes what may be done in the event that arbitration should fail to proceed to a final award. The parties naturally had in mind the New York statute and the New York courts, for the contract was made in New York, both parties were engaged

in business in New York (R. 5), and the coal was to be there delivered. Their dominant intention was to provide for arbitration and strengthen that purpose by referring to the law in the State where they were and where full effect would be given to such an agreement. The idea of excluding all other jurisdictions was obviously not present. Had it been they would have used language indicating such an intention by using words of exclusion such as are employed in foreign arbitration clauses. No case has been found, except in *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929), hereinafter referred to, where the courts have found it necessary to construe such a clause as to whether it was intended to be exclusive. Such intention is easy to express.

The motive for selecting a foreign jurisdiction where one of the parties is a resident there or transacting business there, is obvious. Where the parties are residents and citizens of the United States, a motive for such a preference as between State and Federal courts, particularly where the laws concerned are identical, seems entirely lacking. In the usual foreign arbitration clauses, the words "shall" and "must" are generally employed, which leaves no room for doubt.

The District Court, however, construed the clause to be exclusive although considering that "it is somewhat in- [illegible] (R. 32). The Court of Appeals refrained from construing the clause, saying that "it is certainly possible to read the language only as an addition, redundant because already provided by law, and as not intended to prevent arbitration elsewhere" (R. 75).

It is possible to find some degree of exclusiveness in the language without construing the clause so strongly as to find the intention to exclude an American court having

concurrent jurisdiction from staying an action to the end that arbitration may proceed.

In *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929), the parties had entered into a contract in Boston for the sale of tractors to be delivered there. The contract contained a general arbitration clause providing for the appointment of an arbitrator by each, the two so appointed to choose a third. In the progress of a suit in New York, in which arbitration had been ordered, the arbitrators selected failing to appoint a third, the court appointed a third arbitrator as provided by the New York statute. The final issue was whether the court had power so to do in view of the provisions of the arbitration clause in the contract calling for the selection of the third arbitrator by the other two. The New York Court of Appeals sustained the order of the court below, construing the contract so as to give effect *to the dominant intention of the parties, namely, to arbitrate.* In its opinion the court, referring to the general rule that in construing contracts effect should be given to the dominant intention of the parties, said (p. 295):

> "Contracts to submit to arbitration must answer to like tests, elusive though they be. There may be a dominant intention to arbitrate at all events, the machinery of selection being merely modal and subordinate. If so the failure of the means will not involve as a consequence the frustration of the end. Equity will give specific performance of the principal engagement with variations of method appropriate to the facts."

Again referring to the construction of arbitration agreements, the court referring to the parties to such agreements said (p. 303):

> "They are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

These observations seem to us to fit the instant case. To construe the arbitration clause as debarring a Federal court from granting a stay would frustrate the dominant purpose of the parties, that is, to arbitrate. It would seem that by such a construction the parties would indeed be "trapped into an abandonment of legal remedies" (those provided by the Federal Arbitration Act and available to the court into which the defendant has been brought) "unwilled and unforeseen."

The selection of a *foreign* jurisdiction for the determination of all disputes by the parties, one of whom is a resident, has received frequent criticism in the courts. Enforcement of agreements selecting the State courts rather than the Federal courts, or Federal courts rather than State, has been decried, and indeed such discrimination and preference has been declared invalid and unenforceable (Restatement of the Law of Contracts, American Law Institute, Vol. 2, Sec. 558). Reference to this Restatement is made without fear that this or any court will hold the *general agreement to arbitrate* invalid, although it might well refuse to give effect to that part of it which is discriminatory as to the courts in which the arbitration may proceed—if the parties are deemed to have made such exclusive selection. If such an exclusive discrimination between the State and Federal courts is abhorrent to the courts, and perhaps invalid, contracts will certainly be strictly construed against such intent.

POINT III

As to petitioners's Specification of Errors 3 to 11, both inclusive (petitioner's brief, Points II, III, IV), respondent rests upon the citations and reasoning in the opinion by the Circuit Court of Appeals.

An arbitrable issue is presented. The controversy lies within the provisions of the arbitration clause of the contract. The respondent is not in default in proceeding with arbitration or guilty of any laches.

CONCLUSION

The order of the Circuit Court of Appeals should be affirmed with costs.

New York, November 30th, 1934.

Respectfully submitted,

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Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 211.—October Term, 1934.

Shanferoke Coal & Supply Corporation, *vs.* Westchester Service Corporation.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1935.]

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought by the Shanferoke Coal & Supply Corporation, a citizen of Delaware, in the federal court for southern New York against the Westchester Service Corporation, a citizen of the latter State. The declaration alleged that the defendant had by a contract in writing agreed to purchase from the plaintiff a large quantity of coal to be taken in instalments throughout a period of years; and that the defendant had, after accepting part of the coal, repudiated the contract. The defendant set up in its answer, as a special defense, that prior to the commencement of the action a dispute had arisen concerning the construction of the contract, the rights and duties of the respective parties thereunder and its performance; that the contract contained an arbitration clause; and that prior to the commencement of the action the defendant had notified the plaintiff of its readiness and willingness to submit the dispute to arbitration and ever since had been ready and willing to do so; but that the plaintiff had refused to proceed with the arbitration. The defendant then moved that the action, and all proceedings therein, be stayed until an arbitration should be had in accordance with the terms of the contract sued on. The motion was heard on affidavits and counter affidavits.

The arbitration clause is as follows:

"In case any dispute should arise between the Buyer and Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall

select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

The District Court interpreted the clause as making the arbitration enforceable only in state courts of New York; and on that ground denied the stay. On an appeal from the order of denial, the Court of Appeals held that even if the clause should be so interpreted, § 3 of the United States Arbitration Act authorized the stay.[1] It, therefore, reversed the order and directed the District Court to grant the stay, with leave to that court "to vacate it at any time, should it appear that the defendant is in default in proceeding with the arbitration." 70 F. (2d) 297. This Court granted certiorari, 293 U. S. —.

First. The order of the District Court denying the stay was not a final judgment appealable under § 128 of the Judicial Code. Being an interlocutory order, it was appealable to the Circuit Court of Appeals under § 129, only if the denial of the stay should be deemed the denial of an injunction. Compare *General Electric Co.* v. *Marvel Co.*, 287 U. S. 430, 432. That question we must first determine although it was not raised below or by counsel here. See *Mansfield, etc. Ry. Co.* v. *Swan*, 111 U. S. 379, 382. For the reasons stated in *Enelow* v. *New York Life Insurance Co.*, No. 47, decided this day, an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b, is appealable under § 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of § 274b; and that the motion for a stay is an application for an interlocutory in-

[1]Act of February 12, 1925, c. 213, § 3, 43 Stat. 883: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

junction based on the special defense. Compare *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121. As bearing on this question of jurisdiction on appeal it is immaterial whether or not the terms of the contract sued on would preclude entry in a federal court of a decree for specific performance of the arbitration. Since the appeal here in question was taken within thirty days from the entry of the order denying the stay, the Court of Appeals had jurisdiction under § 129.

Second. The plaintiff contends that the District Court was without power to grant the stay, because the contract provides that arbitration can be compelled only by proceedings in a state court of New York. The provision is that "either party may apply to the Supreme Court of the State of New York for an order compelling specific performance of this arbitration agreement in accordance with the arbitration law of the State of New York." The contract does not in terms prohibit proceedings in the federal court. Whether it should be construed so as to exclude the bringing of a suit in the federal court to compel specific performance of the agreement to arbitrate, we have no occasion to decide. For the District Court was not asked, in the proceedings now under review, to compel specific performance. The motion was to stay the action until arbitration shall have been had; and the direction of the Court of Appeals was limited to granting a stay. Section 3 of the United States Arbitration Act provides broadly that the court may "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement". We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with § 4 of the Act.[2] *Marine Transit Co.* v. *Dreyfus*, 284

[2]In the lower federal courts there has been some difference of opinion as to whether a stay should be granted when the court is not in a position to compel arbitration. Compare Danielson *v.* Entre Rios Ry. Co., 22 F. (2d) 326, 328, with The Silverbrook, 18 F. (2d) 144. See, too, The Beechwood, 35 F. (2d) 41; The Volsinio, 32 F. (2d) 357, 358; 36 F. (2d) 773; The Fredensbro, 18 F. (2d) 893. Interpretations of the English arbitration statutes are in accord with the view adopted here. See Law *v.* Garrett, L. R. 8 Ch. Div. 26 (C. A.); Austrian Lloyd S. S. Co. *v.* Gresham Life Assurance Society [1903] 1 K. B. 249; Kirchner & Co. *v.* Gruban, [1909] 1 Ch. Div. 413; The Cap Blanco [1913] Pro. Div. 130.

U. S. 263, 274, is not to the contrary. There is, on the other hand, strong reason for construing the clause as permitting the federal court to order a stay even when it cannot compel the arbitration. For otherwise, despite congressional approval of arbitration, it would be impossible to secure a stay of an action in the federal courts when the arbitration agreement provides for compulsory proceedings exclusively in the state courts; since only in exceptional circumstances may a state court enjoin proceedings begun in a federal court. See *Central National Bank* v. *Stevens*, 169 U. S. 432. Compare § 265 of the Judicial Code; *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

Third. The plaintiff also contends that the defendant was not entitled to a stay because its answer raised no arbitrable issues; and because, on the facts developed by the affidavits, the defendant appears to have waived its rights under the arbitration clause by unreasonable delay in demanding arbitration. The reasons why these contentions are without merit are sufficiently stated in the opinion of the Court of Appeals.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.